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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1704

QUIMET J. PETERSEN,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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May 13, 1974

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

QUIMET J. PETERSEN, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Quimet J. Petersen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 5, 1973.

OPINION BELOW

The opinion of the Court of Appeals, reported at 490 F. 2d 666 (5th Cir. 1973), Rehearing and Rehearing En Banc denied March 15, 1974, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Louisiana.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 5, 1973. A timely petition for rehearing en

banc was denied on March 15, 1974. An order was granted by the Court of Appeals staying the mandate of the Court pending disposition of a Motion for new trial in the District Court. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a warrantless search and seizure conducted in the absence of "exigent circumstances" is justified under the parameters of Chimel v. California, 395 U.S. 752 (1969) or within the guidelines laid down in Carroll v. United States, 267 U.S.132 (1925) for cases involving automobiles.

2. Whether the Government of the United States may fail to disclose evidence in its possession favorable to the accused.

3. Whether the prosecutor's statements were sufficiently prejudicial to require reversal when viewed in light of the decisions of the Fifth Circuit and other United States Courts of Appeals.

4. Whether the seriatum treatment by the Fifth Circuit Court of Appeals, of the trial judge's errors amount to a denial of due process of law when viewed in their totality.

STATUTORY PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Robert Lee Frick and Quimet John Petersen, petition were convicted on five counts under 18 U.S.C.A. Sec. 2, 371, 1341 and 1343 of conspiring to defraud and defrauding certain persons through an alleged sham loan brokerage business by using the mails and interstate telephonic communications.

The factual basis for the indictment arose out of the following facts and circumstances. Robert L. Frick (hereinafter Frick) over a period of weeks in April, 1971, met on several occasions with Frank Crawley, III, the complaining witness.

After discussing a loan and completing the formal application with Frick, Crawley advanced earnest money to Frick. (Tr. 43, 46, 47, 51, 60) Crawley testified, and it is undisputed that he had not met Petersen at that time. (Tr. 56).

It was not until May 18, 1971 that petitioner met Crawley who had come to New Orleans to discuss the loan with Frick. While in New Orleans, Frick advanced the loan committment from Tangible Risk Insurance Company, Ltd. (Tr. 74), at which time Crawley presented to Frick a check (G-9) and some extra cash. (G-11). Petersen was not even present and received nothing. (Tr. 75).

At a later date Frick directed Crawley to mail a $1,000.00 fee to Petersen (Tr. 100). On May 29, 1971 the money was wired to Petersen only because Frick was to be out of town. (Tr. 100-101) The loan committment never came through.

In all of the above transactions Petersen played no part. Crawley's testimony revealed that he thought that only Frick was involved. (Tr. 117, 159-169)

All money obtained from Crawley was paid directly to Frick and was spent by him alone. Only against Frick, did Cralwy have charges filed. (Tr. 117) It was obvious that Frick was completely involved, and Petersen was not really involved at all. (Tr. 164)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is respectfully submitted that the decision and opinion of the Court of Appeals for the Fifth Circuit deviated from the proper interpretation of the Fourth Amendment

in the following particulars:

(1) Petitioner Petersen has standing to contest the search and seizure of the automobile and briefcase.

(2) There were no "exigent circumstances" in the present case such as to justify a warrantless search incident to an arrest.

(3) The search of the briefcase cannot be justified by the "plain view" exception to the Fourth Amendment requirement that a warrant be obtained.

(4) The search of the automobile cannot be justified because there was nothing inadvertant about the searching officer coming onto the object seized, and there were no exigent circumstances.

(5) The search and subsequent seizure of the contents of the briefcase exceeded the permissible scope of a legal search.

(1)

Petitioner Petersen was demonstrated to have standing to contest the illegality of the search and seizure in the District Court.

Testimony on the trial of this matter and at the evidentiary hearing in the District Court on April 19, 22, and 23, 1974 disclosed the real and substantial proprietary interest of Mr. Petersen both in the briefcase, a portion of its contents, and in the car from which the briefcase was illegally seized.

The vehicle was owned by Rothchild Mortgage Investors, a Louisiana corporation in which Petersen was an officer and owner. The briefcase in fact belonged to Petersen, who had merely loaned it to Frick for some mutual business unrelated to matters charged in the indictment. The contents of the briefcase may have in part belonged both to Frick and Petersen, and such contents were used against both of them by the prosecution, particularly the so-called "Sucker Exhibit".

The majority opinion in the Fifth Circuit Court of Appeals found that "[only] defendant Frick has standing to contest the search and seizure." United States v. Frick, 490 F. 2d 666, 669 (5th Cir. 1973), rehearing and rehearing en banc denied March 15,1974. This was based upon an application of the "proprietary interest test" delineated in Brown v. United States, 411 U.S. 223, 229 (1973).

However, based upon the undisputed facts brought out at the evidentiary hearing, it would seem that even under the test set forth by the majority at p. 669, Petersen did have an ownership interest in the briefcase, the automobile, and at least some portion of the contents, much of which was used by and which formed an important part of the case of the Government.

Under these circumstances, Petersen has as much standing to contest the search and seizure as did Frick. Accordingly, a finding by this Honorable Court that the search and seizure were improper and beyond the scope of the Fourth Amendment would entitle defendant Petersen to a new trial.

(2)

There were no "exigent circumstances" in the present case.

The morning after the indictment of defendants Frick and Petersen were handed down, five agents of the F.B.I. arrived at the apartment of defendant Frick with an arrest warrant. They waited until he had left his apartment, reached his car, and unlocked the door before arresting him and handcuffing him. Only then was his briefcase seized from the back seat of the automobile. (Testimony of arresting officer, Motion to Suppress, February 16, 1972, p. 20-21) Agent McDaniels removed the briefcase and searched it without first procuring a search warrant.

There is conflicting testimony as to the distance between defendant Frick and the Briefcase at the time of arrest. Agent McDaniels claimed that the distance was no more than one foot whereas Frick testified that the distance was considerably further.

Under the foregoing facts, the warrantless search was "per se unreasonable" and violative of the Fourth Amendment,unless justified by certain exigent circumstances. Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971). Realizing this the majority opinion upheld the denial of the motion to suppress on two bases: 1) the search was justified under Chimel v. California, 395 U.S. 752 (1969), as incident to a lawful arrest; and 2) the search was within the guidelines laid down in Carroll v. United States, 267 U.S. 132 (1925) for cases involving automobile searches.

In considering the justifications offered

in support of a warrantless search, as the Court did in Coolidge v. New Hampshire, supra at 454, 455:

> "We must not lose sight of the Fourth Amendment's fundamental guarantee.
>
> "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depriciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.
>
> "Thus the most basic constitutional rule in this area ia that 'searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption ***that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'"

A recognized exception to the rule that a warrant is needed to conduct a search is a search incident to an arrest. The majority panel opinion of the Fifth Circuit Court of Appeals sought to rely on Chimel v. California, supra, in finding that the search was justified as incidental to an arrest. Yet in that case, the Supreme Court held:

> "There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, supra at 763. (emphasis added)

The briefcase was not within that area from within which Frick could have gained possession of a weapon or destructible evidence. He was handcuffed and in the custody of five Federal agents. To allow a search and seizure of a nearby briefcase at this point would be to ignore the rationale of Chimel, that is 1) to protect the officers, and 2) to protect destructible evidence. Neither of these factors were present.

If Frick's estimate of the distance between himself and the briefcase is accepted then the seizure of the briefcase, certainly not within defendant's reach, would be impermissible under Chimel. However, the reasoning of the Chimel opinion also negates the permissibility of the warrantless seizure in question even if the arresting agent's testimony as to distance is to be accepted. The justification for a search,

that it would avoid the possibility of defendant's endangering the lives or safety of the police, or the possibility of a defendant's destroying evidence nearby, was completely absent.

> "By any reasonable interpretation, the area within Frick's control at the time of this search amounted to no more than his own person, under the most generous constructions of Chimel," Judge Goldberg concluded in his strong dissenting opinion. United States v. Frick, supra at 673.

The majority opinion is entirely

> "devoid of any indication of the manner in which Frick, an individual with no previous record for recklessness or violence, might have accomplished the rather extraordinary feats of overpowering his trained captors, breaking his bonds, and destroying the crucial evidence." Id.

> "Indeed, if the federal agents legitimately thought that Frick might gain access to the briefcase, their conduct in removing it from the car and opening it in his presence appears precisely calculated to increase, rather than remove, that possibility. If, as agent McDaniels testified, the car door was open at the time of the arrest, the commonplace action of depressing the lock and closing the door would have provided the maximum possible protection against the dangers of violence and destruction outlined in Chimel." Id.

Additionally, Frick could have easily been arrested in his apartment either during

the previous evening or early that morning. Instead, agent McDaniels and the other agents waited in the parking lot until defendant Frick had left his apartment, walked down to his vehicle (a white cadillac, which was most conspicuous and which was known to McDaniels and which had been recognized and examined from the outside and the briefcase spotted) unlocked it, and opened the door. (Testimony of arresting agent, Motion to Suppress, February 16, 1972, p. 19). When one considers this, as well as that the arrest warrant was issued the previous day, it becomes clear that since agent McDaniels knew of the briefcase and of its importance, he delayed arresting Frick long enough to be able to seize the briefcase and be able to argue that it was within some exception to the warrant requirement. Consider also that the F.B.I. agents had been on the scene sufficiently long for others to have attempted to arrest defendant Petersen, fail to locate him, and arrived to join agent McDaniels (Testimony of arresting agent, Motion to Suppress, February 16, 1972 pages 18, 22-23).

The similarity of the plan allegedly devised and executed by the arresting officers in Chimel v. California, is too obvious to be coincidental.

> "The petitioner correctly points out that one result of decisions such as Rabainowitz and Harris is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here, but the fact remains that had he been arrested

earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant. In any event, even apart from the possibility of such police tactics, the general point so forcefully made by Judge Learned Hand the United States v. Kirschenblatt, 2d Cir., 16 F. 2d 202, 51 A.L.R. 416, remains:

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home." Id. at 203.

* * * *

"Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search, was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments and the petitioner's conviction cannot stand." Id.

The testimony of agent McDaniels makes it abundantly clear that he was fully familiar with the law and that he had set things up so as to justify the warrantless search.

> "At that--well, the people I talked to or interviewed, said that Mr. Frick had the favors, which he had used it on that occasion, in his briefcase, and that he had it when he was talking to them. So at that point I felt that being in a place I had a right to be, and observing the briefcase from that place, I felt that there was probable cause to believe that contained in that briefcase at that time." (Testimony of arresting agent, Motion to Suppress, February 16, 1972, p. 23) (emphasis added).

Agent McDaniels knowingly arranged and executed the arrest in such a way as to be in a place "where he had a right to be." The only significant difference between Chimel and the present case is that having ascertained that the briefcase was in the Cadillac, it was arranged that the warrantless search not be conducted at Frick's home but at his automobile.

This is not a case where one hour after a description of armed men is given, they are arrested. Rather this is a case wherein there was a prolonged investigation and a formal indictment, and the circumstances were such as the F.B.I. felt that the arrest of Frick before the indictment was not required. Certainly there was ample time to have obtained a warrant if there was reasonable cause to seize the briefcase or even if the agents had felt that the briefcase should not be missed. It is clear that the Government agents staged the arrest in

order to obtain papers they could not obtain through lawful judicial processes. To permit such deliberate disregard of the Fourth Amendment's requirements as the Court of Appeals did is to read out the salutory requirements of the well-considered law.

(3)

The search of the briefcase cannot be justified as being in "plain view."

As Your Honors stated in Colliдge v. New Hampshire, 403 U.S. 443 at 468 (1971):

> "* * *[P]lain view alone is never enough to justify the warrantless seizure of evidence. * * * Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measures of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make warrantless seizure." [emphasis added]

The Sixth Circuit, as recently as April 5, 1973, held that a warrantless seizure of an automobile can not be justified on the theory that it was in "plain view". Lewis v. Cardwell, 476 F. 2d 467 at 470 (6th Cir. 1973), cert. granted 94 S.Ct. 567 (Dec. 3, 1973).

> [When] law enforcement officers have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the Fourth Amendment principle that warrantless seizures

are per se unreasonable in the absence of exigent circumstances."

"What the plain view cases have in common is that the police officer in each of them has a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Coolidge v. New Hampshire, supra."

There was nothing inadvertent in the present case about the F.B.I. agent coming upon the evidence. He admitted that he had reasonable cause to believe the briefcase had been with Frick all along and if agent McDaniels had believed that the briefcase was necessary to make his case, he should have and could have obtained a warrant from a magistrate, just as he did an arrest warrant. A contrary result makes a mockery of the Fourth Amendment.

Ad Judge Goldberg concluded in his vigorous dissenting opinion:

"in this case, as in Coolidge, the 'premises' of the criminal suspect consisted of his automobile. Since the FBI agents did not have to enter the car in order to effect Frick's arrest, they had no independent justification for the intrusion on a constitutionally recognized zone of privacy. In the absence of such a justification, the plain view doctrine cannot apply.

"Even had the officers been entitled to enter the car, however, the resort to plain view would fail. Frick challenges the introduction of the contents of the briefcase and not the case itself. Those papers were most

> certainly not in view at all until the seizure and search had been completed . . . .This is precisely the kind of broad search Chimel was written to curtail. United States v. Frick at 16, n.2. (emphasis added).

(4)

The search of the vehicle cannot be justified by the mobile nature of the automobile, in the absence of other circumstances.

The holding of the majority emphasized the "mobile" nature of the automobile and sought to rely upon Chambers v. Maroney, 399 U.S. 42 (1970) However, as Judge Goldberg pointed out:

> "At the outset it should be noted that any holding in favor of the applicability of the Carroll exception only takes the Government over the first hurdle - it justifies the removal of the briefcase from Frick's car. The subsequent warrantless inspection of the contents of the closed briefcase requires independent analysis." (United States v. Frick, supra at 674)

There are two general requirements for the application of the "car exception" first recognized in Carroll v. United States, 267 U.S. 132 (1925) in order to permit the warrantless search of an automobile: first, the arresting officers must have probable cause to believe that the vehicle contains contraband or other evidence. Second, certain exigent circumstances must demonstrate that it is not practicable to secure a warrant Coolidge v. New Hampshire, supra at 460, quoting Carroll v. United States, supra at

152. The facts of the present case manifestly fail to substantiate either of these essential elements.

The majority also relied heavily on Chambers v. Maroney, 399 U.S. 42 (1970). However Chambers and the present case are factually dissimilar. In Chambers there was probably cause to search the car, in that witnesses to a robbery had given a description of the car and its occupants to the police. Within the following hour, a car of that description was stopped, the four occupants removed, and their car was taken to police headquarters. The later search of the vehicle itself without a warrant was upheld, but the Court specifically held that this was not a search incident to an arrest. Chambers v. Maroney, supra at p. 47. The search was instead one based on probable cause.

In the present case there was no probable cause to search the automobile of Mr. Frick and Rothchild Mortgage Investors. The Government's failure to procure a warrant before departing for Frick's apartment substantiates this conclusion. Furthermore, mere suspicion does not constitute probable cause. See Giordenello v. United States, 357 U.S. 480 (1958); Brinegar v. United States, 338 U.S. 160 (1949); Black v. Ohio, 379 U.S. 89 (1964). In this case the agent's suspicions bore fruit, but fruit tainted by the illegality of the search itself.

Even assuming that probable cause existed for the belief that Frick's automobile contained evidence of the crime, the search must still be justified by the presence of exigent circumstances which made it impractical for the FBI agents to obtain a

warrant.

The factual situation in the present case is similar to the one found in Coolidge v. New Hampshire, supra at 461-462, in which a warrantless search was not permitted.

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States - no criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, not contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile In short, by no possible stretch of the legal imagination can this be made into a case where it is not practicable to secure a warrant."

The majority panel of the Fifth Circuit Court of Appeals in this case mentions three allegedly "exigent circumstances" justifying the search of Frick's car and briefcase: (1) the mobile character of the attache case, (2) the possibility that an unknown friend of the defendant might remove the evidence, and (3) the possibility that the suspect himself, once released on bail, will destroy the evidence.

The first alleged exigent circumstances necessarily reduces the meaning of Coolidge to an absurdity.

> ". . .(A) good number of the containers that the police might discover on a person's property and want to search

> are equally (as) movable (as an automobile), e.g., trunks, suitcases, boxes, briefcases, and bags. How are such objects to be distinguished from an unoccupied automobile - not then being used for any illegal purpose - sitting on the owner's property? It is true that the automobile has wheels and its own locomotive power. But given the virtually universal availability of automobiles in our society there is little difference between driving the container itself away and driving it away in a vehicle brought to the scene for that purpose. Of course, if there is a criminal suspect close enough to the automobile so that he might get a weapon or destroy evidence within it, the police may make a search of appropriately limited scope. Chimel..... But if Carroll v. United States.... permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of Carrol." 403 U.S. at 461, n. 18 (emphasis added)

The second alleged "exigent circumstance" fails because the record fails to indicate any real fear on the part of the agents that an unknown friend of Frick's might possibly attempt to remove the evidence. Note additionally, that Petersen had already turned himself in at that time.

The third alleged "exigent circumstance" also fails upon immediate scrutiny because the possible release on bail will exist in nearly every criminal case. If such a

possibility constitutes an exigency, then warrantless searches would become the general rule and not the exception.

(5)

The search and subsequent seizure of the contents of the briefcase demonstrably exceeded the permissible scope of the Fourth Amendment search.

Judge Thornberry aptly noted the recent decisions of the Fifth Circuit Court in his dissenting opinion in United States v. Cyzewski, 484 F. 2d 509, 518 (5th Cir. August 29, 1973):

> "There is a second reason why the search in this case should not be upheld. . . .
>
> We have recently held in United States v. Soriano, 5th Cir. 1973, 482 F. 2d 469 that police officers with probable cause to believe that a suitcase contained contraband were justified by exigent circumstances in seizing it without a warrant, but that they were obligated to secure a warrant before inspecting its contents. See also United States v. Garay, 5th Cir. 1973, 477 F. 2d 1306." (Emphasis added)

In the case of United States v. Soriano, 482 F. 2d 469 (5th Cir. 1973), reh. granted, the Court was concerned with an appeal by the Government from a pretrial order of the trial court suppressing the fruits of a warrantless search of three suitcases. The court found probable cause to believe that the occupants of the taxicab were carrying narcotics. The Government did not argue that the search was legitimately incident to a lawful arrest nor was it valid under

the plain view exception. The Government argued that the search was proper because exigent circumstances justified failure to secure a warrant and a warrant to search personal effects is not required after they have been legitimately seized. The Court upheld the lower court and held:

> ". . .Also, the search exceeded the scope of justification for the initial intrusion, while exigent circumstances required seizure of the suitcase and detention pending issuance of a warrant, they did not require an immediate warrantless search of the contents.
>
> "Thus the search was unlawful because it intruded on an interest protected by the Fourth Amendment and because a warrant could have been readily obtained without prejudicing the need for effective law enforcement."
> Id. at 476 (emphasis added)

Viewed from any angle the FBI agents were not justified in failing to first obtain a search warrant before conducting the search of the automobile as well as the search of the briefcase and subsequent seizure its contents.

II. THE FAILURE OF THE UNITED STATES TO DISCLOSE EVIDENCE IN ITS POSSESSION FAVORABLE TO THE PETITIONER IS REVERSIBLE ERROR AND JUSTIFIES THE GRANT OF CERTIORARI TO REVIEW THE JUDGMENT BELOW.

Motion was filed on behalf of defendant Petersen and granted by Magistrate Sear to require the Government to turn over to the defense all evidence that was favorable to the accused. The United States Attorney claimed on several occasions that he had no Brady Material. (Pre-Trial Stipulation and Order page 2.)

The allegations of fact contained in paragraphs 3 and 4 of Count I were realleged as the basis for Counts II, III, IV, and V of the indictment. Count I, paragraphs 3 and 4 read as follows:

"3. It was a further part of said conspiracy and scheme to defraud that the defendants furnished to Frank Crawley, III, fraudulent financial statements of the Tangible Risk Insurance Company, Ltd., and fraudulently represented that the aforesaid financial statements were accurate and valid.

"4. It was a further part of said conspiracy and scheme to defraud that the defendants furnished to Frank Crawley, III, a fraudulent and false letter of commitment from the Tangible Risk Insurance Company, Ltd., wherein said company agreed to loan the sum of $375,000.00 to him, when it truth and fact

> the defendants well knew that the representations contained in said letter of committment were false and fraudulent and said loan commitment was not valid when presented to him."

Under such circumstances, the Government was required to disclose any evidence and witnesses which it had in its possession which would have tended to establish the existence and operations of Tangible Risk Insurance Company, Ltd. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 10 Led 2d 215 (1963), Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 Led. 2d 1217 (19 59) Giglio v. United States 405 U.S.150, 92 S. Ct. 763 31 Led. 2d 104 (1972).

The Prosecuter, Mr. Robert Livingston, had in his file the following basic information: (all of which has now been filed with the Fifth Circuit)

1. Information in the FBI initial report which indicated that the Oklahoma City Postal Inspector who was investigating was familiar with Tangible Risk Insurance Company, Ltd. Similarly, Floyd Henson stated that he had read in Business Week of July 10, 1971 that Tangible Risk was a subsidiary of the Bank of Sark. (the article itself indicated that there had been investigations and indictments in Birmingham, among other places)

2. Correspondence from the Postal Inspector in Shreveport setting forth the existence of Tangible Risk, and providing to Mr. Livingston the name of Mr. J. E. Council, the Government's top investigator of Tangible Risk. Here again, several sources of information concerning the existence and location

of Tangible Risk offices and agents were disclosed.

3. Correspondence from Mr. Joseph A. Humphreys, which included other committments, balance sheets, and even the corporate charter and name change. There were even inquiries from loan brokers which had been approached by Tangible Risk, setting up a factual situation as to them similar, to the defense of the defendants in the present matter. Mr. Humphreys was subpoenaed by the Government but was not required to appear.

Mr. Livingston testified in great detail that he did not feel that any of this material was Brady material, because it was not exculpatory of the defendants. The key word in Mr. Livingston's understanding is exculpatory." Merely because such information or documents might have been favorable or have led to information that might have been favorable or exculpatory would not have been sufficient under the test used by the prosecutor to determine Brady material.

The law, with regard to Brady material, does not stop with the requirement merely that exculpatory material be furnished, the test set down by Your Honors and the various Courts of Appeal is considerably broader and encompasses in addition, material which is favorable to the defendant or which may lead to favorable or exculpatory evidence.

Wright, Federal Practice and Procedure, Sec. 557 page 529 stated:

". . .(T)he suppression by the prosecution of evidence favorable to an accused upon request violated due pro-

cess where the evidence is material either to guilt or to punishment, regardless of the good faith or bad faith of the prosecution." (emphasis added)

In United States v. Polisi, 416 F. 2d 573 (2d Cir. 1969) at 577, the Court states the test in a similar way:

"Similarly, the general rule does not apply where the prosecutor has suppressed evidence exculpatory of or otherwise favorable to the accused. The prosecutor has a duty not to use evidence known to be false, even if he did not instigate the perjury* * *" (emphasis added)

In United States v. Miller, 411 F. 2d 825 at 832 (2d Cir. 1969) the Court of Appeals reversed the failure of the trial judge to grant a new trial, stating:

"The test, however, is not how the newly discovered evidence concerning the hypnosis would affect the trial judge or ourselves but whether, with the Government's case against Miller already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. We cannot conscientiously say there was not."

Brady v. Maryland, 373 U.S. 83,83 S.Ct.1194 (1963) is the watershead case in this area. In that case the Court stated at pages 1195-1196:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not'the result of guile,' to use the words of the Court of Appeals. 226MD., at 427, 174 A. 2d at 169." (emphasis added)

In Levin v. Clark, 408 F. 2d 117 at 1211, 1212, and 1215 (D.C. Cir. 1967), the Court considered the test which should be used, the rationale for such test and then proceeded to apply the test in the particular

factual context before the Court in order to require a new trial.

> "The Government's facilities for discovering evidence are usually far superior to the defendant's. This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. The concern is not that law enforcers are breaking the law but that innocent people may be convicted.
>
> "The question is what kinds of evidence must the prosecutor reveal? Various courts have talked about 'favorable' evidence, 'material' evidence, 'pertinent facts relating to (the) defense, 'information impinging on a vital area in (the) defense,' evidence vital 'to the accused persons in planning and conducting their defense,' and 'evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is useful.' Without excluding any of these relevant considerations, in the present case we focused upon the ultimate possibility of harm to the defendant--the possibility of erroneous conviction--and we stated the standard in terms of whether the evidence 'might have led the jury to entertain a reasonable doubt about (defendant's) guilt.'

> "This standard requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial--whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically. In Griffin v. United States, the Supreme Court directed us to consider 'whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.' We think it would be too dogmatic here."

Using the particular tests suggested in that discussion, the Court found that the statement of a key witness constituted information favorable to the defendant that was required to be disclosed:

> "If the jury had known of McCeney's statement and had taken it to indicate that there was no exchange into smaller bills, then Landriscina's description of the transaction would have fallen and with it the heart of the Government's case. Of course the jury might have disbelieved McCeney, or it might have decided that the exchange took place even though McCenye and Hooper did not remember it. Or the jury might have

convicted on the basis of the circumstantial evidence even though it believed that the exchange of bills and the transaction surrounding that exchange had not occurred. Yet it is clearly within the realm of possibility that the jury would have 'attached significance' to McCeney's statement.

"We would be required to reverse, then, even if the statements only significance were in the way a jury might have viewed it. However, the statement has another importance. With knowledge of McCeney's statement, defense counsel certainly would have probed deeper into what was the central aspect of the Government's case. For example, with some investigation, reconstruction of events, and discussions with Hooper and McCenye, defense counsel might have been able to transform their inability to remember the transaction into a positive statement that there was no exchange of bills."

Here as there, it is clear that: "if defense counsel knew of McCeney's pre-trial statement, the course of the trial might have been quite different.

In Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177 at p. 178 (1942), the Supreme Court said:

"Petitioner's papers * * *set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his confiction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently

charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody."

In Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972) at p. 766 the Supreme Court reaffirmed the holding of Napue that:

"A new trial is required if 'the false testimony could. . .in any reasonable likelihood have affected the judgment of the jury. . ."Napue v. Illinois, supra at 271, 79 S.Ct. at 1178, 3 L. Ed. 2d 1217."

In United States v. Mele, 462 F. 2d 918 at 924-925-926 (2d Cir. 1972), the Court stated:

"Due process requires, however, 'that different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. At least where the suppression is deliberate the defendants need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763. 31 L.Ed. 2d 104 (1972). See also United States v. Keogh, 391 F. 2d 138 (2 Cir. 1968); Kyle v. United States, 297 F. 2d 507 (2 Cir. 1961). In these cases, where there has been a considered decision to suppress and where the value of the information 'could not have escaped the prosecutor's attention.' United States v. Keogh, supra, at 147, it is not necessary to engage in any exact determination of the degree of prejudice to the

defendants."

* * * * *

"In this case it is clear from its very inception that the prosecution labored to keep vital information from the defense, the trial judge and the jury. In addition, in some official narcotics agents' reports slanted information was inserted and produced to the defense, the judge and the jury in order to enshroud the Government's initial deceit. Moreover, its initial equivocal statement both with the trial court and with us stating there was 'no credible and relevant evidence' to support the charge that the Government had planted a paid informer within the intimate circle of the defense, even to the extent of his attendance at the defense table during the trial, is beyond our comprehension and cannot be condoned. In our detailed examination of the pleading, the evidence and the argument of counsel we cannot say that in the light of these deliberate excisions, slanted reports and misrepresentations--made again and then again--that the jury could not in any reasonable likelihood have been affected in its verdict. Giglio v. United States, supra; Napue v. Illinois, 360 U. S. 264, 271, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959).

"Of course, even in cases of extreme prosecutorial misconduct, a new trial is not granted if the suppressed evidence or the misleading portions of the Government's case could not possibly have had an effect on the jury's verdict. Our examination of the case here,

however, convinces us that if the jury had known the full truth, it might reasonably have reached a different result.

* * * * * *

"If the whole truth had been available, and if the defense were given the opportunity to explore the suppressed evidence, 'reasonable doubts' about the defendants' guilt could certainly be raised."

* * * * * *

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* * * * * *

"While Attorney General of the United States I noticed an inscription that was carved in the oak panel of my anteroom and embossed in gold: "The United States wins its point whenever justice is done its citizens in its courts." We regret to say that the record here does not comport with that high standard. The judgment is Reversed."

It is much to be regreted that the record in the present matter both in the District Court and in the Court of Appeals reveals the same refusal of the Government to disclose evidence that is similarly favorable to the defendants and which would certainly have had an effect on the verdict of the

jury.

In Giles v. State of Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967), the question which this Honorable Court stated but did not answer was:

> "Thus this case presents the broad questions whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial."

The Court was able to obviate this issue by discussing two pieces of newly discovered evidence, which justified reversal, as in the present case. However, at p. 810, Justice Fortas, in a concurring opinion, addressed himself to this issue:

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense--regardless of whether it relates to testimony which the State has caused to be given at the trial--the State is obliged to bring it to the attention of the court and the defense."

In United States v. Hibler, 463 F. 2d 455 at 459-460 (9th Cir. 1972), the prosecutor justified his failure to disclose evidence to the defense on the ground that he did not think it was "material". In response

to this the Court stated:

> "There is no doubt that the prosecution in a criminal trial has a duty of candor toward the defendant. Brady v. Maryland, 1963, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215. This duty is an ingredient of due process. The test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial. That defense counsel did not specifically request the information, that a "diligent" defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process can be denied by failure to disclose alone. Jackson v. Wainwright, 5 Cir., 1968, 390 F. 2d 288; Levin v. Katzenbach, D.C. Cir., 1966, 363 F. 2d 287, 290, 124 U.S. App. D.C. 158; Barbee v. Warden Maryland Penitentiary, 4 Cir., 1964, 331 F. 2d 842, 845; United States ex rel. Meers v. Wilkins, 2 Cir., 1964, 326 F. 2d 135, 137, 140; United States ex rel. Thompson v. Dye, 3 Cir., 1955, 221 F. 2d 763, 768, cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773; United States ex rel Almeida v. Baldi, 3 Cir., 1952, 195 F. 2d 815, 820, cert. denied 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed.1341. 'In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel.' Barbee v. Warden, supra, 331 F.2d 842, at 846.

"We agree with the District of Columbia Circuit's description of the role of the prosecutor in situations like this:

> "When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible and for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78 (55 S.Ct. 629 79 L.Ed. 1314). . .' Griffin v. United States, 1950, 87 U.S. App.D.C. 172, 183 F 2d 990,993.

The prosecutor's unilateral decision not to disclose the evidence 'invited the risk of error.' Application of Kapatos, Wainwright, supra, 390 F. 2d at 298.

"Thus Hibler is entitled to reversal if the government failed to disclose evidence which, in the contest of this particular case, might have led the jury to entertain a reasonable doubt about his guilt. While in many cases it might be true that evidence of the type involved would not be crucial on the issue of a defendant's guilt or innocence, we have here a case, as we have shown, in which the evidence was extremely close. The credibility of Haynes and Hibler were vital issues. This court has specifically held that undisclosed

> evidence may be "material" on the issue of an accused's guilt or innocence even though it goes only to credibility. Loraine v. United States, 9 Cir., 1968, 396 F. 2d 335, 339, cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed. 2d 270.

At page 39 of the typewritten brief to the Fifth Circuit, the Government states: "Brady v. Maryland, 373 U.S. 82 (1963) requires that the Government produce all evidence favorable to the defendants which is material to their innocence of punishment* * *." This hardly seems different from the standard urged by defendant Petersen, although considerably different from the standard applied by Mr. Livingston. At page 40 of the typewritten brief, the Government states:

> "Unless there are unusual circumstances, such as knowingly concealing evidence which is favorable to a defendant, the Government is granted wide discretion in calling witnesses to prove its case. The Government is not ordinarily compelled to call all of the witnesses who are competent to testify including special agents or informers. There are situations when the Government is required to call a witness whom the Government has reason to believe will give exculpatory testimony."

How very applicable this statement of the law would seem to be to Mr. Humphreys.

In the Opposition to Motion for a New Trial filed in February of 1974, the Government at page 3-4 states as to the requisites for granting a new trial as follows:

"An exception is suppression by the Government of evidence of an exculpatory or otherwise favorable nature which is material to the issue of guilt, irrespective of the good or bad faith of the prosecution."

At page 10 of its Memorandum in Support of Opposition, the Government stated:

"When the accused requests evidence from the prosecutor which is withheld, if such evidence is material to the guilt or punishment of the defendant, without regard to the good or bad faith of the prosecution, due process is violated. Citing Brady v. Maryland, 373 U.S. 83 (1963). It is necessary that the evidence be material; however, its probable effect on the jury is not the sole reason for granting a new trial. It is to deter prosecutorial misconduct or negligence to insure that prosecutors will bring to light all significant evidence that was known or should have been known to them."

The activities and rationale of the prosecutor in the present case certainly fall within the prohibition recommended by the Government's own counsel. Due process required that the defendants in the present case receive such material and information and call as a witness Mr. Humphreys causes the conduct of the Government to fall beneath the minimum standards of Due Process and requires that the new trial be granted.

The alternative ground for which justifies the grant of Certiorari is that of use by the trial attorney for the Government of information, testimony, and strategy

which he knew to be misleading or actually false, and the subsequent attempt of the Government to cover this up.

The prosecutor testified as to what he said and the reason for these statements. The statements made by the prosecutor, himself are discussed hereinafter.

It is the contention of petitioner that the prosecutor presented his case and obtained a jury verdict against the defendants on the basis of statements and implications concerning Tangible Risk which were false and which he knew to be untrue. Additionally, Mr. Livingston elicited from Mr. Henson testimony which Mr. Livingston later used in his argument to the jury to conclude that there was no Tangible Risk Insurance Company. At page 220 of the Transcript of the main trial, Mr. Henson testified that he had sued Tangible Risk and the Bank of Sark. Had the defendants been aware of the Business Week article and the statement of Mr. Henson that he felt that Tangible Risk was a subsidiary of the Bank of Sark, it is certain that skilled defense counsel could have, through cross-examination and argument, developed a gaping hole in the theory of the Government that Tangible Risk did not exist and was a name conjured up solely by the defendants.

This type of suppression and the active misrepresentation contained in the argument made by Mr. Livingston constitutes an independent and potent ground for a retrial.

Equally or more reprehensible was the activities of the Government in attempting to suppress and cover up the material in the Government's file when information as

to the existence of Tangible Risk was discovered by the defendants. In the original brief of defendant Petersen the following statement was made:

> "The Government actually subpoenaed a witness, who unbeknownst to defendants did have knowledge that was favorable to the defendants. Mr. Joseph P. Humphreys, Executive Director, Non-Admitted Insurers Information Office, was not called to testify, nor was his existence disclosed. There were very likely others of whose existence defendant is still unaware.
>
> "In addition defendant has now discovered that prior to this trial the office of the United States Attorney in St. Louis, Missouri and Chicago, Illinois had conducted an investigation of Tangible Risk Insurance Company, Ltd., which investigation and the results thereof which (sic) were favorable to the defendants (in that it disclosed a company in operation which was in the business of making committments and loans), and which was known to the office of the United States Attorney in New Orleans because a portion of the case involved one Santo DiFatta, who had made a complaint to the United States Attorney in the Eastern District of Louisiana."

The United States treated of this issue at pages 39-41 of its typewritten brief, and in considering the factual contentions of defendant the following statements were made:

"Petersen has merely made an unsupported statement that Joseph R. Humphrey had information which would have been favorable to him and he testified. Petersen has not shown what this information was or his reason for believing that it would have been favorable. He could have called Humphrey as his own witness although he was not required to do so.

"The assertion that there may have been other witnesses with information favorable to the defendant is purely speculative. That the United States Attorney's Office may have known there was a company entitled "Tangible Risk Insurance Company, Ltd.," located in St. Louis, Missouri, or in Chicago, Illinois, which information was not given to the defendants does not consist of a failure to provide Brady material. The existence of such a company would not be exculpatory to the defendants." (page 41)

At the oral argument of May 31, 1973 in the Fifth Circuit, the Assistant United States Attorney handling the appeal. Mrs. Mary Williams Cazalas, made the statement to the Court that she had discussed the matter with Mr. Robert L. Livingston, the Assistant United States Attorney who had handled the trial of the case, and that he had no knowledge of any investigation being conducted relative to the Tangible Risk Insurance Company, Ltd. other than that contained within the record of this case. Mrs. Cazalas and Mr. Livingston subsequently filed affidavits in the District Court on this point, copies of which have been filed in the Court of Appeals as Exhibit B and

Exhibit C of the Motion For Leave of Court to File Supplemental Application for Rehearing.

Based on the brief, oral argument, and representations of the United States, The Fifth Circuit made the following statement in its opinion concerning the Brady argument, to wit:

> ". . .Brady v. Maryland, 373 U.S. 83 (1963), does not require all evidence to be produced to the defense, just that which is material. United States v. Jordan, 399 F. 2d 610, 615 (2d Cir. 1968). Nor is Brady applicable at pretrial stages. Archer v. United States, 393, F. 2d 124, 126."

As has been discussed hereinabove, the file of the United States contained knowledge not only of the investigation made of Tangible Risk, but also proof positive of the existence of Tangible Risk Insurance Company, Ltd.; that further Mr. Livingston's file contained information furnished by Joseph Humphreys which would have demonstrated the existence of Tangible Risk. (Copies of this material from the file of Mr. Livingston which have been offered into evidence in the District Court, were annexed in the same motion as Exhibit D and Exhibit E)

Your Honors have most recently reaffirmed and expanded the due process requirements of the Brady doctrine in Giglio v. United States, supra 92 S.Ct. 763 at 766, wherein the Court reiterated the prior law on deliberate prosecutorial misconduct:

> "As long ago as Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959), we said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Id., at 269, 79 S.Ct. at 1177."

A recent case which seems squarely on point with this issue is United States v. Baum, 482 F. 2d 1325 (2d Cir. 1973). In that case the Government concealed the existence and testimony of one Greenhalgh until he was called as the prosecution's final witness of the trial. In reversing as to Baum, the Court stated at pp. 1331-1332:

> "Confronted for the first time with the accusation of prior criminal conduct and the identity of the accuser, the defendant had little or no opportunity to meet the impact of this attack in the midst of the trial. This precarious predicament was precipitated by the prosecutor.
>
> "Ordinarily it is disclosure, rather than suppression, that promotes the proper administration of criminal justice. See Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840, 16 L.Ed. 2d 973 (1966); United States v.

Youngblood, 379 F. 2d 365 (2d Cir. 1967).

"There were no valid considerations to justify the concealment of Greenhalgh's identity as a prospective witness, as in United States v. Persico, 425 F. 2d 1375 (2d Cir. 1970). Greenhalgh was in federal custody. Advance disclosure presented no possible source of present danger to the witness or others. There was no thought that this witness would be reluctant to testify upon disclosure since he was a volunteer who solicited the government to call upon him in the hope of early release from confinement.

"It is the duty of the government to present its case against the defendant fairly. Little can be added to Justice Traynor's statement--'A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense.'

"The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in United States v. Kelly, 420 F. 2d 26, 29 (2d Cir. 1969). In the language of Judge Smith 'The course of the government smacks too much of a trial by ambush, in violation of the spirit of the rules.' To be sure, Baum's attorney did not make a very forceful showing in the district court of what

> cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor."

In the present case "the lack of candor" of the Government is even more striking and concerned an even more crucial issue. For the prosecutor to have stated and reiterated that there was "no Tangible Risk", when his files contained proof positive of the existence of a company by that name constitutes prosecutorial misconduct of the most blatant variety, so much so as to require, in the interest of justice, a retrial, even though (assuming arguendo) no other requisites for the granting of a new trial might have been met.

The present case falls squarely within the pronouncements of the Supreme Court in Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785 (1967). In that case it turned out that the "blood stained" shorts to which the prosecutor constantly referred, were merely stained by paint.

In reversing and remanding the case, Your Honors stated at pp. 787-788:

> "The prosecution's whole theory with respect to the exhibit depended upon that misrepresentation. For the theory was that the victim's assailant had discarded the shorts becuase they were stained with blood. A pair of paint-stained shorts, found in an abandoned building a mile away from the

scene of the crime, was virtually valueless as evidence against the petitioner. The prosecution deliberately misrepresented the truth.

More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. There has been no diviation from that established principle.

Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct.1173, 3 L.Ed. 2d 1217; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; cf. Alcorta v. State of Texas, 355 U.S. 28,78 S.Ct. 103, 2 L.Ed. 2d 9. There can be no retreat from that principle here.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS WITH RESPECT TO WHETHER THE PROSECUTOR'S VERBAL IMPROPRIETIES AND STATEMENTS WERE SUFFICIENTLY PREJUDICIAL TO REQUIRE REVERSAL.

The misconduct and verbal improprieties of the prosecutor with reference to his opening argument, his statements during trial, and in his initial and rebuttal closing arguments were sufficient to require reversal of this matter and remand for a new trial.

The record in this case reveals a prosecutor who has stepped beyond the bounds of his role as a representative of the United States to become an unsworn witness for the prosecution.

In the opening argument the following statements were made:

> "We feel that we will prove that the defendants did devise a scheme to defraud, ***"
>
> "We intend to prove that they promoted their scheme all over the United States *** (Open Argument p. 5, Emphasis added)
>
> "We are going to prove that Tangible Risks Insurance Company was a name only, that it was never qualified to do business in Oklahoma, and, in fact, it couldn't possibly lend Mr. Crowley the $300,000." (Opening Argument p.8 Emphasis added)
>
> "The government will prove that in fact Mr. Crowley never got the loan

> of $300,000 and in fact he never got his $9,-00 back, and, in fact, the defendants paid no attention to his requests for his money back.
>
> In fact, I think that the evidence will verify that Mr. Crowley considered himself threatened by the defendants not to take any action against them to get his money back. (Opening argument pages 8-9, Emphasis added)
>
> "We will show that in fact they went so far as to call their clients or their customers what they really thought of them. On one occasion they called their client a sucker.
>
> "Once all the witnesses have testified, ladies and gentlemen, we feel that there will be no doubt that the defendants did intend to defraud Mr. Crowley," (Opening Argument page 11, Emphasis added)

The Court of Appeals for the 9th Circuit in Leonard v. United States, 277 F. 2d 834, 841 (9th Cir. 1960) made a good statement of what should be in the opening statement:

> "An opening statement should be limited to a statement of facts which the government intends or in good faith expects to prove. It should not be argumentative in character, nor should it be designed to destroy the character of the defendant before the introduction of any evidence of the crime charged in the indictment."

The opening statement in the case at bar hardly meets this criteria.

In Government of Virgin Islands v. Turner, 409 F. 2d 102, 104 (3d Cir. 1968), a similar situation to the present case was presented and the overturning of an overwhelmingly strong case against the defendant was upheld over a strong dissent and only with great reservations. In that case, the Court stated:

> "The government's opening was not what, in our opinion, an opening should be. The purpose of an opening is to give the broad outlines of the case to enable the jury to comprehend it. It is not to poison the jury's mind against the defendant, and it is certainly not to recite items of highly questionable evidence. In the present case, having formally complained against the defendant for making two charges on the credit card totalling $800, the government in its opening informed the jury that, using Cain's card, the defendant "made various charges in various parts of the United States, Puerto Rico, and the Virgin Islands ***. (T)here was a total of more than $4,000 in fraudulent charges ***. (I)n the Virgin Islands alone there was a total of nine charges totalling $2,244.27."
>
> "The government claims that such evidence was admissible as proof of a course of conduct to show wrongful intent. We have considerable question; this would not seem a case of ambiguity. Cf. United States v. Kirkpatrick, 6 Cir., 1966, 361 F. 2d 866; United States v. Prince, 3 Cir., 1959, 264 F. 2d 850. If defendant was the user of a credit card that did not belong to him, his wrongful intent would seem inevitable. Hence reference to other occasions

cast no additional light, but would merely serve to prejudice the jury be indicating other crimes. Government of the Virgin Islands v. Oliver, 3 Cir., 1966, 360 F. 2d 297. But quite apart from this, admissibility of the other occasions presupposes that defendant was the one who made the other purchases. All the government offered to support its opening was that, on the American Express records, charges in the amount asserted had been made against the card. Instead of this evidence adding probative weight to the case against defendant, it assumed, rather thanproved, that defendant had been the one to use the card, the essential question at issue."

"During oral argument government counsel frankly conceded what we had already inferred, that these other charges had not been proceeded upon because the identification evidence with regard to them was unsatisfactory. If it could not be proved that defendant effected these charges, they had no place in the case. The court's exclusion of the government offer of proof of other unauthorized charges against the card was clearly correct, and by the same token the government's opening was unsupported, and hence improper. Furthermore, the government had good reason to know it was unsupported.

Only with great hesitation do we find errors of this magnitude to be nonprejudicial. The court's exclusion of the proferred evidence in the presence of the jury and its general charge not to regard statements of counsel as evidence, helped, but it may be questioned whether this was enough to offset the

effect of the opening. A jury may not easily forget or overlook what it has been told by a government representative, particularly in the absence of more specific directions to do so. However, in this case we find the government's evidence against this defendant so overwhelming that it is difficult to see how an unfulfilled statement that there was more could have made any difference. On the evidence introduced we cannot see how any jury could have failed to find the defendant guilty. Under these exceptional circumstances, we will not hold the over-ambitious opening to have been prejudicial error. See Berger v. United States, 1935, 295 U.S. 78, 55 S.Ct. 629, 79L.Ed.1314, citing Fitter v. United States, 2 Cir., 1919, 258 F. 567; cf. Chapman v. State of California, 1967, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705."

In the present case, the government's case against Petersen was far from overwhelming.

During the course of the trial other prejudicial statements and misstatements were made:

BY MR. LIVINGSTON:

"Specifically, sir, do you have any telegrams from one Frank Crawly, Shawnee, Oklahoma, from one Quimet J. Petersen?" (Tr. 19, Emphasis added)

At Tr. 110, Mr. Livingston was admonished by the Court after he stated:

"Did they make any claims that you had misrepresented some of the facts?

COURT

"Rephrase your question."

Mr. Livingston constantly made reference to Mr. Frick and Petersen in his questions, indicating to the jury he believed that either or both were involved. (Tr. 108 125, 127, 132)

At Tr. 212, Mr. Livingston attempted to get prejudicial evidence to the jury:

> "Mr. Crawly, do you know whether or not Mr. Richard Suttle or Dick Suttle lost any money to these gentlemen?"

to which the objection made by counsel for Petersen was sustained. However, the damage, by that time had already been done.

In addition, Mr. Livingston had G-25 blown up, and made many comments on this and other issues in his closing argument which were completely prejudicial to defendants, were highly inflammatory, and which tended to cause the jury to enter a verdict of guilty in the absence of proper evidence.

With regard to Mr. Livingston's unsworn and incorrect testimony concerning Tangible Risk Insurance Company, Your Honors should consider that the evidence did not bear out either the indictment or the statements of the prosecutor that Tangible Risk Insurance Company was name only and did not exist. The only mentions of Tangible Risk in the record were at Tr. 123, 141, 146, 172, 206, 219-221, and 252-253. Nowhere was it proven that Tangible Risk did not exist. In fact , as has been discussed, the Government supressed evidence and witnesses in its possession and under its control which established the

existence and activity of Tangible Risk Insurance Company.

A review of the closing argument will reveal that the prosecutor had, for the purposes of the case, substituted himself as first person singular, for the impartial status that the Government is supposed to take.

Other examples of the improprieties of the prosecutor in his closing statement are as follows (page numbers are taken from the latest volume of material which was transcribed)

> "We feel that after looking at those exhibits, you will in fact return a verdict of guilty." (p. 88, emphasis added)
>
> "Now, really the evidence is quite clear that the acts were committed. The acts themselves." (p. 89)
>
> "There is no doubt about the act." (p. 91)
>
> "I don't know what happened to that check, but it's around here somewhere, and if you find it, I hope you will recall that act is proved." (p. 92, emphasis added)
>
> "His Honor instructed that we need only prove one act. I submit to you we proved all acts." (P. 92)
>
> "I think we have ample evidence, the documents, to show that he complied with every condition that was made of him, but he didn't get anything but a lot of phoney promises." (p. 93)

(See Hall v. United States, 419 F.2d 582, 5th Cir.)

"No doubt about it, ladies and gentlemen, the acts were committed, all of them were definitely committed." (pp. 97-98)

"We submit that the Tangible Risk Insurance Committment letter didn't bind Tangible Risk. It didn't bind anybody because there was no tangible risk." (p. 100)

"International Fund, I think, in the Paul Harrell matter was never really showed to exist." (P.102) (emphasis added)

"There is evidence that Tangible Risk doesn't exist. We have introduced G-26 and G-27, certificates from the secretaries of the State of Louisiana and Oklahoma saying that neither company is qualified to do business in either state." (p. 103)

Note how the prosecutor has backed off some small amount from the statement in the opening statement that "We are going to prove that Tangible Risks Insurance Company was a name only, *** (opening statement p. 8)

"Ladies and gentlemen, I really hate to beat them into the ground, it's so obvious from all this evidence, if it's not, all I can say is listen to the testimony of Mr. Bourland." (p. 105, emphasis added)

"Again, what's the purpose of the odd-ball names, the phoney names?

"It doesn't make sense, ladies and gentlemen, if this is a legitimate deal." (p. 106)

During the initial closing argument, the prosecutor "testified" concerning Government Exhibit G-25, the so-called "sucker" exhibit, as follows:

"Now, this is a typical committment letter, -- agreed to arrange a loan, it's hereby agreed, read the whole form at your leisure, ladies and gentlemen, and when you read it for your ease in seeing this, I am going to ask you to look specifically at the bottom of the form.

There is a space for Mortgage Corporation of America or Mortgage Consultant Associates in this case, signed, two spaces, and a space down here for the witnesses to sign, and there is one other space, and I have blown this up so that you can see exactly what that other space is and see what these guys think of their proposed customers or clients, because I think you may have anticipated what I was going to show you, if you haven't, take a look at this work right here, accepted, sucker. That was found on Frick's person, ladies and gentlemen, that's what he thought of the men that paid them money to give them loans.

Ladies and gentlemen, if you can't look at that and find intention to defraud, then you will never find it. So I can't argue any further.

I have to yield to counsel. I'd rely on that."

> We ask that you find the defendants guilty as charged."

This certainly is prejudicial, and takes away from the jury their function as finders of fact, by leaving them no alternative but to find in favor of the government.

Furthermore, in the rebuttal closing argument, the prosecutor made a comment on the failure of the defendants to have a certain person testify, to wit: M.A. Green.

> "Mr. Smith wasn't there. Mr. M.A. Green, whose name is on that committment letter, wasn't there. Nobody is there to this day. They never met anyone from Tangible Risk. And I ask you, ladies and gentlemen, if this trial is as important as both counsel would have you believe, where is Mr. M.A. Green? Where is the representative--representative of Tangible Risk or International Funding or any one of these other companies?"

The Government knew of the existence and whereabouts of officers and agents of Tangible Risk, and failed to disclose the same, in the same way that it knew about Tangible Risk and other similar matters and refused to disclose these matters.

With regard to Tangible Risk, the prosecutor then stated as follows:

> "It doesn't matter whether or not there is a Tangible Risk somewhere in the world.
>
> The big thing is that there has never been indicated to Mr. Crawley that there is a Tangible Risk."

I think when you say that Tangible Risk is not qualified to do business either here or in Oklahoma that does mean something, and in fact Tangible Risk never did exist."

He then began his own testimony once again:

"But I ask you also in -- when you sit down to ponder whether or not Petersen had anything to do with this fraud scheme, it was a fraud scheme, I think by this time it must be fairly obvious to you that the fact that Kim Petersen under the name of Traver gave Claude Bourland $100,000.00 worth of no-good checks means he had intent to defraud. That was before the Crawley matter.

But after the Crawley matter, Mr. Frick was picked up with certain things in his possession, and among those things was his letter with Kim Petersen and Bob Frick, and if this thing doesn't indicate an intention to defraud, then nothing does. They call their clients suckers."

Finally Mr. Livingston made his final personal plea to the jury:

"I am asking you to believe Mr. Crawley. I am asking you to believe every witness that testified. I think if you do, you have got to find a verdict of guilty as to both defendants.' (p. 165)

Activity of prosecutors less crucial and flagrant has uniformly been held to be prejudicial misconduct, properly requiring reversal. Reeves v. Warden, Maryland

Penitentiary, 346 F. 2d 915, 922 (4th Cir., 1965); Corley v. United States, 365 F. 2d 884 (D.C. Cir., 1966); United States v. Simmons, 414 F. 2d 800 (9th Cir., 1969). In Jones v. United States, 338 F. 2d 553, 554, the Court reversed a conviction for this type of misconduct, stating:

> "In her opening statement the prosecuting attorney told the jury that the Government's witness 'observed one of (the defendants) come out from the doorway of that store. He observed them apparently working or loading something into their Volkswagen truck.' But the proof did not bear this out. The witness did not testify that he had seen one of the defendants 'come out from the doorway" or that he had seen them apparently working in or loading something into their Volkswagen truck." The prosecuting attorney nevertheless pressed the point: ****
>
> "Thus on three separate occasions during a one-day trial, Government counsel sought to shore up obvious weaknesses in the Government's case. It is true that the court instructed the jury that the opening statement of counsel was not evidence. It is also true that the answers to the questions containing the factual assertions denied them and that the jury was instructed to disregard one of the questions. Nevertheless, we are not in a position to say, in a case as paper-thin as this one appears to be, that the suggestions contained in the opening statement and in the questions were not responsible, in some degree at least, for the convictions in these cases."

It is clearly improper for a prosecutor to express his personal opinion in his jury argument. Rule 15 of the Canons of Professional Ethics (D.R. 7-106 (c) (4)), Dunn v. United States, 307 F. 2d 883, 88 (5th Cir., 1962). In Hall v. United States, 419 F. 2d 582, 585-587, (5th Cir., 1969) The Court reversed a conviction for improprieties of this same type by the prosecutor, stating:

> "The voucher for Degnan's personal integrity was blatantly improper. It invaded the province of the jury. It went beyond credibility to general integrity, implying that Degnan was not the sort of person who would force a witness to make a statement. It was not merely based inferentially on a extrinsic evidence but explicitly upon the prosecutor's extrajudicial knowledge of Degnan and his opinion based on that knowledge. This court reversed for the personal voucher for the witness in Gradsky v. United States, 373 F. 2d 706 (5th Cir. 1967). Here, as there, the jury was led to believe there was evidence unknown or unavailable to the jury that established credibility."

Compare the following from Hall v. United States, supra at 587.

> "3. The statement 'we try to prosecute only the guilty.'
>
> 'The statement 'we try to prosecute only the guilty' is not defensible. Expressions of individual opinion of guilt are dubious at best. See part 2, supra. This statement takes guilt as a predetermined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental

establishment had already determined appellant to be guilty on evidence not before them. McMillian, supra, 383 F. 2d at 169. Or, arguably it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence not denigrate the function of the trial nor sit as a thirteenth juror."

Please also see Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968), Reichert v. United States, 359 F. 2d 278, 281 (D.C. Cir. 1966), and United States v. Lamerson, No. 71-2353 (5th Cir. 1972).

With reference to this whole matter, please see Smith v. United States, 312 F. 2d 867 (D.C. Cir., 1962), Hull v. United States, 324 F. 2d 817 (2d Cir., 1963), United States v. Porter, 432 F. 2d 548 (9th Cir., 1970), and especially The Court opinion in Hall v. United States, supra at 588 where the Court states:

"When zeal does outrun fairness and the prosecutor makes inappropriate statements there is a multiple effect which tends to tip the scales in favor of the government. Ordinarily government counsel is, as an individual, 'properly and highly respected by the members of the jury for his integrity, fairness, and impartiality' Thompson v. United States supra 272 F. 2d at 923 (concurring opinion). And, as Berger points out, 295 U.S. at 88, 55 S. Ct.

at 633, 79 L.Ed. at 1321:

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.'

"Added to this is the unseen presence in the courtroom of our great and powerful government with its counsel and its voice in the person of the United States Attorney. For all these reasons his power to persuade is great. And for these reasons he must speak with the care, the decorum and the sensitivity that befit his position and his duties. Neither the heat and strain of trial nor the right to strike hard blows authorizes him to do otherwise. "Reversed."

Clearly this case presents a situation in which the improprieties of the prosecutor were on a central point, where nothing was done by the Trial Judge to mitigate the damage, and where the case against defendant Petersen was so weak as to be paper-thin, United States v. Simmons, 414 F. 2d 800 (9th Cir. 1969).

In U.S. v. Ott, 14 Crl. 2257 (7th Cir.) December 5, 1973 the Court held that a prosecutor's false statement about an informer required reversal. The prosecutor had argued to the trial court that a certain witness was not an informer, but the government had recently argued in a search

and seizure appeal before the Appellate Court that the same man was a reliable informer and the Appellate Court discovered this during oral argument. The Court said:

> "We assume that the denial by the trial attorney was made in good faith in the sense that he did not know that his representation was factually erroneous. Nevertheless, when an unequivocal material representation of this kind is made to the trial judge for the purpose of persuading him to make a ruling favorable to the government, the prosecutor is charged with the knowledge of his associates. Whether the misstatement 'was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such, it is the spokesman for the Government.' Giglio v. U.S., 405 U.S. 150, 10 CrL 3080."

The remarks made by the prosecutor during his opening statement, during the trial, and in the closing remarks were so blatant, obvious and prejudicial as to call into question the fundamental fairness of the entire proceedings against the defendants. It is respectfully submitted that the case should be reversed and remanded for trial with the petitioner being given a trial free from the prejudicial interference and active misstatements of the counsel for the United States.

IV. THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THIS CASE CONSTITUTE A DENIAL OF A FAIR TRIAL AND DUE PROCESS OF LAW IN LIGHT OF THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEAL.

(1) Severance was required in this case.

(2) The so-called "sucker" exhibit was erroneously introduced and allowed to the jury and the prejudice to defendant Peterser was compounded by allowing the Prosecutor to blow up the exhibit and refer to it in his closing argument.

(3) The refusal of the trial judge to permit questions proposed by the defendant to be put to the jury on voir dire examination and in allowing two juries for unrelated cases to be selected at the same time resulted in prejudice to the defendants sufficient to require reversal and retrial.

(4) The Fifth Circuit decision to uphold the refusal of the Trial Judge to grant a continuance after his unexpected changing of his previous granting of the Motion to Sever requires reversal and retrial.

(5) The Trial Court was in error in ordering each juror to receive a copy of the six (6) page indictment as this was improper and prejudicial to the defendants.

(6) For the Trial Judge to have allowed the Government to present evidence of other crimes involving different

and inflaming circumstances required reversal of the conviction.

(7) The motion for judgment of acquittal made on behalf of defendant Petersen should have been granted.

(8) The Trial Court was in error upon the sentencing of the defendant in taking into consideration the evidence of the alleged use by defendants of assumed names on occasions other than those charged.

(9) A Trial Judge may not impose a greater sentence upon a defendant merely because he chooses to exercise his constitutional right to trial by jury.

(10) The Trial Judge was in error in failing to instruct the jury that circumstantial evidence to support a conviction need to negate every reasonable hypothesis of defendant's innocence.

(11) The instruction given to the jury that "It's not necessary to determine whether Mr. Petersen was a member of a conspiracy" was plain error.

(12) Error was committed in instructing the jury to disregard the testimony of witness Franks as to the spontaneous exclamations of defendant Petersen, uttered contemporaneously with the alleged crimes.

1.

Severance was required in this case. A joint trial of this matter was inappropriate

in that it sacrificed the right of petitioner Petersen to a fundamentally fair trial. United States v. Echeles, 352 F.2d 892 (7th Cir. 1965).

The majority opinion of the Fifth Circuit relied on Petersen v. United States, 344 F. 2d 419 (5th Cir. 1965) in upholding the discretion of the trial judge in denying severance. This case in turn derived its test for severance from United States v. Kahaner, 203 F. Supp. 78 (S.D.N.Y. 1962). This test is as follows:

> "The ultimate question is whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted."

Under the circumstances of the case at bar, the task of rendering an impartial and fair verdict was not merely difficult, it was impossible. Defendant Petersen was caught in a web of circumstantial evidence and as the real evidence piled up against Frick, Petersen was dragged down via "guilt by association."

The Fifth Circuit also overlooked the potential for Frick testifying in behalf of Petersen at a separate trial. See United

States v. Shuford, 454 F. 2d 772 (4th Cir. 1971).

It should be noted that at the joint trial there was no way for Petersen to require Frick to take the stand. At a separate trial, or with a joint trial before two different juries, as was originally planned, while Frick would retain his privilege against self incrimination, he would not have a right not to be called to the stand. See Landry v. United States, 283 F. 2d 303.

2.

The so-called "sucker" exhibit was erroneously introduced and allowed to the jury that the prejudice to defendant Petersen was compounded by allowing the Prosecutor to blow up the exhibit and refer to it in his closing argument.

During the course of agent McDaniels' testimony, the Government successfully attempted to introduce the documents which were contained in the briefcase found in the vehicle of defendant Frick. One of those documents was G-25, which was a piece of stationery under the letter head of Mortgage Consultant Associates, at an address other than that of Mortgage Corporation of America. On this letterhead was written the rought draft of a loan brokerage agreement, on which the word "sucker" appeared beneath a rough draft signature line.

The United States Attorney had already testified concerning this exhibit during this opening argument:

> "We will show that in fact they went so far as to call their client or their customers what they really

> thought of them. On one occasion they called their client a sucker." (Opening Argument page 11)

In the closing arguments, the United States Attorney continued in this prejudicial vein.

What did the testimony and evidence actually prove? As incredible as the prior statements of the Prosecutor make this sound, the proof established not that this document was in the handwriting of Frick or Petersen, but that in fact that the handwriting analysis could not establish that either of the defendants had written this.

> MR. LIVINGSTON:
>
> "Your Honors, the FBI laboratory in Washington made a comparison of the writing on G-25 and could not properly compare that or could not reach any results in their comparison to signature cards obtained from--the signatures of the two defendants one way or the other with no results. (Tr. 389)

The instruction given by the Judge Tr. 383 considering the inflammatory nature of the exhibit the statements of the prosecutor and the lack of foundation was totally inadequate. In addition, nothing whatever could possibly have connected this to Petersen.

The use of the enlargement was highly improper because its mere size must have falsely impressed the jury with its significance. There can be no doubt that by the use of the enlargement, the prosecutor, in the eyes of the jury, bridged the gap

between the exhibit and the defendants which he had been unable to do previously by proper methods.

3.

The refusal of the Trial Judge to permit questions proposed by the defendant to be put to the jury on voir dire examination and in allowing two juries for unrelated cases to be selected at the same time resulted in prejudice to the defendants sufficient to require reversal and retrial.

At the pretrial conference and before, the defendants had been informed of the Government's intention to place before the jury evidence of other similar factual situations by which the Government hoped to prove system and intent. The Trial Judge was in error in failing to allow the defendants to submit to the jury, on voir dire, questions which probed the effect on the individual jurors that defendants may have used aliases in these other factual situation, and also whether they could disregard that portion of the system and intent evidence that would tend to strengthen the Government's case in chief.

These voir dire requests were apparently derived from United States v. Napoleone, 349 F. 2d 350 (3d Cir. 1965), and the refusal to give a similar instruction in that case was held to be reversable error. Please also see Brown v. United States, 338 F. 2d 543 (D.C. Cir. 1964), 8 Moore Sec. 24.03 p. 24-32, 33.

In a comprehensive charge to the jury, the Judge covered the recognized rules for weighing and evaluating the testimony of witnesses.

In this case, although the Court upheld the Judge's discretion in refusing to ask the question, the factors that influenced the Court's decision were that the Judge had covered the points of the question in other questions and phases of the trial, namely in his instructions to the jury.

Such unfortunately was not the case at the trial of Mr. Petersen. In the absence of any action by the Judge to cover the points of the questions through instructions or other questions, Mr. Petersen was denied an impartial jury by not being allowed to probe the effect on the individual jurors that the defendant may have used aliases not in the situation for which the indictment had been handed down, but as to other factual situations, and also whether they would disregard that portion of the system and intent evidence that would tend to strengthen the Government's case in chief. This denial of an opportunity to select an impartial jury is sufficient to require reversal and the grant of a new trial.

Please also see Aldridge v. United States, 283 U.S. 308, 51 S. Ct. 470 (1931). Sellers v. United States, 271 F. 2d 475 (D.C. Cir. 1959). Jackson v. Commonwealth, 323 S.W. 2d 874, 875 (Ky. App. 1959) City Transportation Company v. Sission, 365 S.W. 2d 216 (Tex. Civ. App. 1963).

Even more prejudice to the defendants was the selection of two juries from the same venire. Defendant is unable to recall the exact particulars, but recalls that there was a great deal of confusion in that both sets of juries were being voir dired at the same time, and it was not certain which jurors were being picked for each case.

Under such circumstances, the plain terms

of F. R. Cr. P. Rule 24 (a-b) were violated in that the defendants did not have the opportunity to make a proper voir dire and jurors were excused in such a manner that counsel for defendant Petersen was unable to meaningfully utilize his peremptory challenges.

This too should be ground for reversal and retrial.

4.

The Fifth Circuits decision to uphold the refusal of the Trial Judge to Grant a Continuance after his unexpected changing of his previous granting of the Motion to Sever requires reversal and retrial.

During the whole of the pre-trial proceedings, defendant Petersen was represented by Corwin Reed, Esq. It was only two weeks before the scheduled trial on the merits that he retained new counsel. Mr. McGuire prepared the case on the assumption that there would be trial before a dual jury and that Frick would be available to be called as a witness on behalf of Petersen.

The failure of the Trial Judge to order a continuance to allow further preparation in light of the changed situation on the trial clearly and severely prejudiced defendant Petersen. Please see Scott v. United States, 263 F. 2d 398 (5th Cir. 1959), which involved the inability to be able to call a co-defendant, who was not being tried at the same time, United States v. Millican, 414 F. 2d 811 (5th Cir. 1969) and United States v. Ploeger, 428 F. 2d 1204 (6th Cir. 1970). In addition this was the first continuance which would have been given in this matter. See also, Sykes v. Commonwealth of Virginia, 364 F.2d

314 at 316 (4th Cir. 1966), People v. Butcher, 79 Cal. Rptr. 618 (Cal. App. 1969).

The statement of the Supreme Court in Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 849 (1964) is applicable to the present matter:

> "(A)myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

Under the circumstances of this case, it is respectfully submitted that the District Judge was in error in failing to grant the continuance requested and further that this error was sufficiently prejudicial to the petitioner to constitute a denial of a fair trial.

5.

The Trial Court was in error in ordering each juror to receive a copy of the six (6) page indictment as this was improper and prejudicial to the defendants.

In upholding the Trial Judge's decision to give a copy of the indictment to each of the jurors, the Fifth Circuit cited United States v. Baker, 418 F. 2d 851 (6th Cir. 1969), cert. denied. 397 U.S. 1015 (1970). In that case, it was held to be error for the Judge to give copies of the indictment to the jury absent proper instruction. Therefore, the test would be whether or not the judge gave proper instructions in the present case. Judge Rubin instructed the jury that the allegations of the indictment (many of which were not proven, nor even attempted to be proven by the government) were not evidence. Was this enough? It would seem not. For instance, in Court I, Overt Act D, it is stated,

> "On or about May 17, 1971, at New Orleans, Louisiana, the Defendants, Robert Lee Frick and Quimet John Petersen met with Frank Crawley, III, and obtained a check for $4,677.50 and $937.50 in cash."

And yet the evidence at the trial was to the effect that Petersen was not even present when the check was passed (Tr. 75), and Crawley gave Frick the cash to keep for himself and not to be turned over to his superiors (Tr. 143).

Over Act E states: "On or about May 29, 1971, the defendants, Robert Lee Frick and Quimet John Petersen caused Frank Crawley, III to wire $1,000.00 to Quimet John Petersen at New Orleans, Louisiana." But the evidence established that only Frick requested the money to be wired to Petersen (Tr. 100-101) and there was further evidence to establish that the reason that Frick requested the money to be wired to Petersen was that Frick was to be out of town.

The combined effect of the affirmative misstatements of the Prosecutor when coupled with the strong terms of the indictment (which were not proven) resulted in the jury being unable to separate evidence which they had heard during the trial from the affirmative averments of the indictment.

This action of the Trial Judge in allowing the indictment to go with the jury, when considered with all of the other errors which concerned the jury, could not help but cumulate to the mutual disadvantage of the defendants, and is accordingly a justification for reversal of this matter and retrial upon remand. In addition, the indictment as drawn

was improper and prejudicial to the defendant.

6

For the Trial Judge to have allowed the Government to present evidence of other crimes involving different and inflamming circumstances required reversal of the convictions.

Much was made by the Prosecutor that in the factual situations presented to the jury supposedly to show system and intent, the defendants allegedly used aliases.

Additionally, the voir dire question concerning the use of aliases was not given and the voir dire was not transcribed, leaving this Court in the dark concerning the effect of such statements on particular jurors. (which is reversible error, See Stirone v. United States, 341 F. 2d 253 (3d Cir. 1965) at 255 n. 4, cert. denied, 381 U.S. 902, 85 S.Ct. 1446, 14 L. Ed. 2d 284 (1965))

The prosecutor made much of the use of aliases in the closing argument, and the instructions given by the Trial Judge did not at all advert to anything which would have tended to disuade the jury from allowing such overemphasis to be given the alleged use of aliases.

Under such circumstances, the system and intent evidence should have been excluded and its inclusion was most prejudicial and requires reversal. Sand Soon Sur v. United States, 167 F. 2d 431 (9th Cir., 1948).

7

The motion for judgment of Acquittal made on behalf of defendant Petersen should have been granted.

As has been set forth hereinabove, even taking the Government's evidence at face value, the evidence was insufficient to support a conviction of defendant Frick much less defendant Petersen. Particularly weak, as shown above, was the evidence other than the statements of the prosecutor concerning Tangible Risk Insurance Company. The existence, vel non, of Tangible Risk was clearly the keystone of the Government's whole case.

There was not one word of proof that the Tangible Risk committment was not good when made. Indeed Crawley testified that he never attempted to locate or make demand upon Tangible Risk (Tr. 141). As the material in the file of the prosecutor demonstrated, Tangible Risk does in fact exist.

The evidence is entirely lacking to support a conviction of Petersen on any of the Counts of the indictment. The Government's own witness testified that Petersen was not involved in this particular transaction (Tr. 164) Indeed the prosecuting witness contacted Petersen at the insistence of the FBI on July 14, 1971 and after all of the matters in the indictment had been completed. This meeting confirmed only that Petersen knew nothing of this particular transaction.

The evidence is undisputed that Petersen had no connection whatsoever in any of the matters alleged in the indictment other than the $1,000.00, which Frick had requested Crawley to mail to Petersen. Crawley did not even know Petersen at this time and telegraphed the money to a "Que" Petersen, Crawley only finding out later who Petersen really was (Tr. 165).

Indeed, there is no evidence to suggest that Petersen was anything more than Frick's

Chauffeur in this particular transaction. Crawley knew it and even after the transaction had soured in his estimation, he still referred to Frick as the only person involved (Tr. 165).

Under such circumstances, it has been held that the evidence was insufficient to support convictions on indictments brought under 18 USC 1341. Please see Henderson v. United States, 425 F. 2d 134 (5th Cir. 1970) at 140-143 and cases therein cited. Please also see United States v. Marino 421. F. 2d 640 (2d Cir. 1970).

The system and intent evidence that Frick and Petersen may have used assumed names on other occasions lends no support to the conviction on this indictment in that in this particular case, they were known by their right name.

As to the offense charged (as distinguished from the system and intent offenses), the only evidence against Petersen is purely circumstantial, and fails to exclude the entirely reasonable hypothesis that Petersen and Frick had ceased doing business under assumed names; that Petersen had nothing whatever to do with the particular transaction charged in the indictment; or that Petersen was anything more than Frick's chauffeur at the time of the instant transaction.

In the case of Vick v. United States, the United States Court of Appeals for the Fifth Circuit stated that:

> In circumstantial evidence cases, this Court has said repeatedly that to sustain conviction the inferences reasonably to be drawn from the evidence must not only

be consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence.

Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954). See also Hale v. United States, 510 F. 2d 147, 149 n. 3 (5th Cir. 1969). South v. United States, 412 F.2d 697, 699 (5th Cir. 1969).

The Fifth Circuit in Montoya v. United States, 402 F.2d 847, 850 (5th Cir. 1968) reversed the failure to grant such a motion.

8.

The Trial Court was in error upon the sentencing of the defendants in taking into consideration the evidence of the alleged use by defendants of assumed names on occasions other than those charged.

Trial Court sentenced defendants to prison terms rather than to probation partly on the basis of their having used assumed names on occasions other than those charged. Supplementary Transcript, p. 4. Defendants used their correct names at all times relevant to the offense charged in the indictment. The effect of the Trial Court's action is to burden defendants down with phantom "prior convictions" for which they never have been convicted, and for which they still might be charged and tried. Since the Trial Judge admittedly sentenced defendants for crimes other than those charged in the indictment. Your Honors have jurisdiction to reverse the sentences and to remand the matter to the trial court with instructions to resentence defendants solely on the basis of the offenses for which they were convicted.

9.

A Trial Judge may not impose a greater sentence upon a defendant merely because he chooses to exercise his constitutional right to trial by jury.

In sentencing defendant Petersen, a father of three, a family man, and a first offender, the Trial Court made it clear that the reason for imprisonment rather than probation was to punish Petersen and Frick for having "put the government to the expense and difficulty of a rather honoris (onerous) trial." Supplementary Transcript, p. 5.

Incarceration for having exercised a constitutional right is foreign to our legal system. Your Honors should reverse as illegal such a sentence, in that no possible exercise of discretion could justify such a statement and apparent open disregard for the rights of an accused.

Please see United States v. Schmidt, 376 F.2d 751 (4th Cir.), cert. denied, 389 U.S. 884, 88 S.Ct. 158, 19 L.Ed.2d 183 (1967). United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

In the case at bar, it would be a vain and useless thing to move this Court for a reduction of the sentence it has just imposed. United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959). Appeal is the proper remedy to correct an illegal sentence. Cook v. United States, 171 F.2d 567, 569 (1st Cir. 1948), cert. denied, 336 U.S. 926, 69 S. Ct. 647, 93 L.Ed. 1088 (1949). But see Withrow v. United States, 420 F. 2d 1220 (5th Cir. 1969).

The sentence imposed upon defendant Petersen is patently cruel, unusual, and an abuse of judicial discretion. The sentences would be reversed with instructions to the Trial Court to resentence defendants under terms no more severe than if defendants had pleaded guilty.

10.

The Trial Judge was in error in failing to instruct the jury that circumstantial evidence, to support a conviction, needs to negate every reasonable hypothesis of defendant's innocence.

Trial Judge simply neglected to instruct the jury that circumstantial evidence must negate every reasonable hypothesis of defendants' innocence. Since the trial court did in fact charge the jury on circumstantial evidence generally (Tr. p. 456), the omission of the necessary caution is plain error whether requested or not. See United States v. Schmidt, 376 F.2d 751 (4th Cir.), cert. denied, 389 U.S. 884, 88 S.Ct. 158, 19 L.Ed. 2d 183 (1967). The rule would be otherwise if the trial court instead had simply omitted to charge on circumstantial evidence at all.

11.

The Instruction given to the Jury that "It's not necessary to determine whether Mr. Petersen was a member of a conspiracy" was plain error.

Without any notice to defendant Petersen or his counsel, the Trial Judge went outside of the prepared jury charges which had previously been examined by counsel, and charged the jury:

"It's not necessary to determine whether Mr. Petersen was a member of a conspiracy" Tr. 446

While the context of these words is ambiguous, this fact alone makes the instruction confusing and prejudicial. In a case as complex and unfamiliar to laymen as the case at bar, it is plain error to so instruct the jury, and it was not incumbent upon defense counsel to notice the court's ad lib or to request a correction of same, particularly since, as here the Court had prepared and distributed lengthy charges, and had insisted upon objections in advance. United States v. Schmidt, 376 F.2d 751 (4th Cir. 1967), cert. denied, 389 U.S. 884, 88 S.Ct. 150, 19 L.Ed. 2d 183 (1967).

The confusing nature of such a charge tended to make the jury rely the more on the plain statements of the indictment and on the prejudicial pronouncements of the prosecutor.

12.

Error was committed in instructing the jury to disregard the testimony of witness Franks as to the spontaneous exclamations of defendant Petersen, uttered contemporaneously with the alleged crimes.

The instruction of the Trial Judge to disregard the testimony of Maurice Franks is violative of the rule of Chambers v. Mississippi, 93 S.Ct. 1038 (1973).

In the Chambers cass, the Supreme Court reversed the refusal of a state court to permit into evidence so-called hearsay evidence which was favorable to the accused.

Just as in the present case, the argument

was made by the state that the testimony of the witness was not "adverse" to, or "against" Chambers. The Supreme Court found this argument not to be convincing and would have permitted it to be introduced.

At the trial, defendant Petersen called as his witness one Maurice R. Franks, a New Orleans attorney who had handled some of defendant's civil affairs. Mr. Franks told of a conversation he had had with Petersen at the very time the crimes allegedly were being committed.

Defendant Frick objected (Tr. 399-403), which objection was sustained by the court on the grounds that Petersen's spontaneous utterance was self-serving. (Tr. 403)

The statements are admissible as a part of the res gestae and are not rendered inadmissible simply because they are exculpatory rather than inculpatory.

There can be no issue as to the factor of proximity of utterance to the event, since the remarks were made on May 31, 1971, while the defendants allegedly were in the process of conspiring and defrauding as charged. To the extent that the factor of proximity rests within the discretion of the trial court, the honorable trial court abused its discretion. See also Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645 (1915), Bennette v. Bader, 337 Mo. 977, 87 S.W. 2d 413 (1935) Roberts v. United States, 322 F.2d 892 at 898 (8th Cir. 1964), United States v. Edmonde, 63 F.Supp. 968, 971 (D.C.D.C. 1946), United States v. McIntire, F.2d (No. 72-1216), 5th Cir., June 23, 1972.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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May 13, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mary Williams Cazalas, 500 St. Louis Street, New Orleans, Louisiana 70130, Counsel for the United States, Respondent. I further certify that all parties required to be served have been served.

LOUIS R. KOERNER, JR.
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New Orleans, Louisiana 70112
Counsel for Petitioner

USA. V. FRICK, 490 F.2d 666 (5th Cir. Dec. 5,1973) reh. & reh. en banc denied March 15, 1974

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2275

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

versus

ROBERT LEE FRICK and
QUIMET JOHN PETERSEN,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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(December 5, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge: Defendants Frick and Petersen were convicted on five counts under 18 U.S.C.A. §§ 2, 371, 1341 and 1343 of conspiring to defraud and defrauding certain persons through a sham loan brokerage business by using the mails and interstate telephonic communications. Only the question concerning

> offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Brown v. United States, 411 U.S. 223, 229 (1973). Petersen contends that he has met the "proprietary interest" test by being in partnership with defendant Frick. Partnership, however, did not give him a proprietary interest in Frick's attache case, the thing searched.

II.

For a warrantless search to be valid under the Fourth Amendment, it must fall within one of the "few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The case at bar meets the required exception as a search incident to a lawful arrest.

> [It] is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. ... In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. ... There is ample justification, therefore, for a search of the arrestee's person and the area

the legality of a warrantless search of defendant Frick's briefcase requires discussion of the reasons for our holding that the search was valid incident to arrest. The other seventeen errors asserted by defendants are subject to affirmance without extended discussion.

The morning after his indictment, defendant Frick was arrested at his car in the parking lot adjacent to his apartment building. At the time of the arrest, F.B.I. Agent McDaniels spotted an attache case lying on the back seat of Frick's car, approximately two feet from the defendant. Recognizing the attache case as Frick's and knowing that Frick had used it on numerous occasions during his "loan negotiations," McDaniels seized the case on probable cause that it contained evidence pertinent to the arrest. An immediate check of its contents bore out McDaniels' suspicions: the case contained documents used in the fraudulent transactions. The defendants assert that the seizure and subsequent search of the attache case without a warrant violated Frick's Fourth Amendment rights.

I.

Only defendant Frick has standing to contest the search and seizure. Under the test recently established by the Supreme Court, defendant Petersen

> (a) [was] not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) [was] not charged with an

> "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel v. California, 395 U.S. 752, 763 (1969).

Although there is some dispute in the record as to the exact distance between Frick and the automobile,[1] and whether the door was open or closed, these discrepancies become inconsequential when the reasonableness of the search is tested by the *Chimel* standard. The automobile and the attache case were within the area of Frick's immediate control. The attache case was not isolated or hidden in some distant room of the house or securely locked in the trunk of the car. It was in plain view and readily accessible to Frick. The possibility of it housing, not only the evidence found, but also a dangerous weapon was not remote.

The exigencies of the situation plainly justified Agent McDaniels' actions. The officers were dealing with objects which are extremely mobile: the automobile and the attache case. There is the possibility that co-defendant Petersen might have removed either of them prior to the officers obtaining a warrant.[2] Some other

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[1]Agent McDaniels testified that the distance was 15 - 16 inches; Frick, testifying before the magistrate, stated it was two feet.

[2]Defendant Petersen voluntarily appeared before the magistrate after learning of the indictments. The arresting officers did not know of this. At the time of Frick's arrest, two of the officers had failed to locate Petersen at his residence and had

friend unknown to the officers might have done likewise. It would be reasonable to expect Frick would be released on bond within short order and again be free to exercise his control over the automobile and the attache case.

To prevent these possibilities, Frick contends Agent McDaniels could have stationed an officer with the automobile while another proceeded to secure the warrant, or in the alternative, that the officers take the attache case but postpone their search until the impartial magistrate issued a warrant. The defense overlooks a vital Fourth Amendment interference: by stationing a guard over the car or removing the attache case while securing the warrant, a definite "seizure" would take place. This is an intrusion on the defendant's rights, just as much as the search.

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Chambers v. Maroney, 399 U.S. 42, 52 (1970).

On facts similar to the case at bar, the Ninth Circuit

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joined the other officers at Frick's residence, in probability expecting to possibly locate Petersen there.

has recently ruled on the propriety of seizing an automobile or container located therein before obtaining a search warrant.

> Here the police might have seized the car pending a magistrate's determination. This would have been the lesser intrusion upon Evans' rights, but it would have been the greater intrusion upon the rights of Miss Kane, the owner of the car. On the other hand, it is easy to say that the footlocker could be confiscated by the police and taken to the magistrate, but a seizing would then have already occurred — a substantial interference. Standing guard still represents the same interference with property rights as well as an unnecessary use of law enforcement personnel. Under these circumstances, either course might be reasonable under the Fourth Amendment, but the immediate search was preferable. Given probable cause, we hold that the necessary exigent circumstances were present for a warrantless search.

United States v. Evans, ____ F.2d ____, ____ (9th Cir. 1973) [13 Crim. L. Rep. 2342, 2343 July 18, 1973]. Given the probable cause in the case at bar, we hold that the immediate search was reasonable under the circumstances.

The defense also contends that officer McDaniels admittedly knew of the attache case for a considerable period prior to the arrest, knew of its possible con-

tents, and had adequate time to secure a search warrant after the indictment and prior to leaving on his arrest mission. This contention misreads the nature of the facts which gave probable cause to believe the case contained evidence.

An attache case is designed to be a convenient receptacle to temporarily carry while in transit a small quantity of papers or items of like nature. The probability that it contains business documents flows from the fact that the case is being used in conjunction with business travel. The probability that Frick's attache case contained documentary evidence at that time arose from a combination of factors: (1) Frick had utilized the case to carry loan documents on a previous out of state business trip; (2) he was arrested on a work day; (3) at his automobile; (4) at a time in the morning which is normally associated with going to work; and (5) he had the attache case with him. Agent McDaniels could not have known that all of these events would coincide prior to the time of the arrest. Yet it was because these factors did coincide that probable cause existed.

Finally, the defense argues under *Chimel, supra,* that the arrest was "staged" to enable Agent McDaniels to search and seize the attache case. Frick was not arrested immediately after the indictment was returned but was arrested the following morning. The arrest took place in the parking lot rather than Frick's apartment. Arrest immediately after the return of the indictment is not required, however. It is sufficient that the arrest be within a reasonable time after the

indictment. *United States v. Palmer*, 435 F.2d 653, 655 (1st Cir. 1970). Agent McDaniels testified that Frick was not arrested in his apartment because the officers had difficulty in locating it in the building. Immediately thereafter, Frick was discovered in the parking lot, and the arrest completed. McDaniels testified that he had not observed the attache case prior to the arrest. This evidence does not support the argument that the arrest was "staged" to permit the search and seizure.

III.

The other challenge to the convictions of the defendants are without merit and we address them seriatum, combining some, without regard to which defendant asserted the error on this appeal.[3]

(1) The evidence presented was sufficient to support the convictions. *United States v. Glasser*, 315 U.S. 60, 80 (1942).

(2) The District Court's instruction to the jury concerning circumstantial evidence was not erroneous. *United States v. Stokes*, ____ F.2d ____ (5th Cir. 1973); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971).

(3) Since the entire transcript was presented to defense counsel, the issue on appeal is moot. *United States v. McDowell*, ____ F.2d ____ (5th Cir. 1973).

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[3]Petersen claims eighteen errors were committed; Frick bases his appeal on six.

(4) There was no abuse of discretion in the denial of the motions for severance and for continuance. *Peterson v. United States*, 344 F.2d 419 (5th Cir. 1965).

(5) There was no abuse of discretion in denying the submission of questions proposed by the defense to the prospective jury on Voir dire examination. *See United States v. Jackson*, 448 F.2d 539 (5th Cir. 1971). The Voir dire transcript does not reveal any prejudice to the defendants through the jury selection process.

(6) The prosecutor's statements were not sufficiently prejudicial to require reversal.

(7) It was within the discretion of the trial judge to allow the "sucker" exhibit to be introduced as evidence.

(8) There was no error in allowing the Government to present evidence of other crimes to show system and intent. *United States v. Goldsmith*, ____ F.2d ____ (5th Cir. 1973); *United States v. Harrison*, ____ F.2d ____ (5th Cir. 1972).

(9) *Brady v. Maryland*, 373 U.S. 83 (1963), does not require all evidence to be produced to the defense, just that which is material. *United States v. Jordan*, 399 F.2d 610, 615 (2d Cir. 1968). Nor is *Brady* applicable at pre-trial stages. *Archer v. United States*, 393 F.2d 124, 126 (5th Cir. 1968).

(10) The Government has no duty to call all of the witnesses it subpoenas. *United States v. Harper*, 460 F.2d 705, 706 (5th Cir. 1972).

(11) The jury was properly instructed concerning the indictment, and could have copies of it during deliberation. See *United States v. Baker*, 418 F.2d 851 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970).

(12) Taken as a whole, the jury instruction to disregard the testimony of Mr. Franks was proper since the testimony was hearsay.

(13) The trial judge could consider the defendants' use of assumed names since the only limitation on the information the judge is permitted to consider in sentencing is that which in fact is not true. *Davis v. United States*, 376 F.2d 535 (5th Cir. 1967).

(14) Cruel and unusual punishment did not result from sentencing the defendants to prison rather than probation.

(15) It was not error for the trial judge to deny defendants' motions for acquittal and new trial.

AFFIRMED.

GOLDBERG, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I and III of the opinion of my brother Roney, but I am compelled to dissent from the panel's holding that the seizure and search of the defend-

ant Frick's briefcase was lawful. This Circuit has already heard from me at some length on what I feel to be the erosion of Fourth Amendment guarantees by a hostile judiciary, *see United States v. Colbert and Reese*, 5 Cir. 1973, 474 F.2d 174, 179; and it is with some reluctance that I have undertaken yet another dissent in the area. My brothers may well hope, as I do, that this will be my postlude to the dirges that have been scored for the Fourth Amendment, but I cannot absolutely forswear future elegies, for the concepts of individuality and privacy expressed in that Amendment are sacred to me. This latest exercise in loose construction, if not distortion, of both the language of the Constitution and the applicable decisions of the Supreme Court requires an answer. For that reason I regretfully, but firmly, dissent.

Our inquiry must begin, as the panel opinion itself seems to accept, with the recognition that warrantless searches are always exceptions to the general Fourth Amendment rule. As such they are "per se unreasonable" unless justified by certain exigent circumstances, *Coolidge v. New Hampshire*, 1971, 403 U.S. 443, 454-55; nor are these exigencies to be easily found. The Supreme Court has persistently reminded us that the exceptions are few in number, *Katz v. United States*, 1967, 389 U.S. 347, 357; limited in construction, *Jones v. United States*, 1958, 357 U.S. 493, 499; and difficult of proof, *McDonald v. United States*, 1948, 335 U.S. 451. Only when these admonitions are firmly in mind is it possible to appreciate the broad swathe the panel's opinion cuts through Fourth Amendment law.

gent" circumstances. *Chimel* provides that *at the time and place of arrest* the apprehending officers may conduct "a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. at 763.

At the time of the search in question here the defendant Frick was in the custody of five federal agents; he either had been, or was in the process of being, handcuffed; and he stood in an open parking lot between one and one half and two feet away from his automobile. On the basis of these facts my brothers in the majority conclude that a search of the briefcase was justified out of a reasonable fear that Frick might gain access to its contents and either turn a weapon on the agents or dispose of evidence. However, the opinion is understandably devoid of any indication of the manner in which Frick, an individual with no previous record for recklessness or violence, might have accomplished the rather extraordinary feats of overpowering his trained captors, breaking his bonds, and destroying crucial evidence.

By any reasonable interpretation, the area within Frick's control at the time of this search amounted to no more than his own person, under the most generous constructions of *Chimel*. While it must be admitted that had Frick been possessed of the skill of Houdini and the strength of Hercules, he might conceivably have reached the contents of the briefcase, neither the panel majority nor the court below placed

him in such legendary company. The possibility of legerdemain cannot create the justification for a warrantless search, at least under my reading of Supreme Court decisions in this area. I do not believe my vision distorted or my view myopic. Had the agents nevertheless feared that Frick might reach exceptional levels of strength and cunning as a result of his desperate plight, surely the simple expedient of closing and locking the car door would have had the salutary effect of protecting the defendant's interests in privacy while guarding the safety of the officers and the integrity of the investigation from an irrational rampage.[1] Indeed, if the federal agents legitimately thought that Frick might gain access to the briefcase, their conduct in removing it from the car and opening it in his presence appears precisely calculated to increase, rather than remove, that possibility. If, as agent McDaniels testified, the car door was open at the time of the arrest, the commonplace action of depressing the lock and closing the door would have provided the maximum possible protection against the dangers of violence and destruction outlined in *Chimel*.

My brothers in the majority, however, ignore both the fact of Frick's captivity and the clear indication that the agents did not fear possible destruction at his

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[1]Judge Roney dismisses the factual dispute as to whether the car door was open or shut at the time of the arrest as irrelevant to the disposition of this case. Althoug I am of the opinion that, on the facts of this arrest, the automobile and its contents were well outside the scope of Frick's immediate control, regardless of the state of the car door, it is certainly conceivable that the additional barrier of a closed car might be important in the decision of a closer case.

hands. They choose instead to adopt what amounts both literally and figuratively to a yardstick test. Under the view of *Chimel* advocated here the reason for the exception to the warrant requirement — the possibility of serious physical destruction at the time of arrest — is evidently considered irrelevant. The Court looks not at all to the question of whether the briefcase was realistically within Frick's reach. Rather, both the limited standards of *Chimel* and the physical realities of the arrest are subordinated to the panel's own extraordinary theory of Frick's capabilities. Although fictions and physical impossibilities may be tolerable in the interpretation of certain arcane branches of real property law, they have no place in the application of constitutional protections.

Certainly the possibility exists that opinions written and judgments made in the isolation of appellate chambers may too easily ignore the harsh realities of law enforcement, as many critics of the expansion of constitutional rights in the criminal field have been anxious to point out. But the panel's application of *Chimel* to the facts of Frick's arrest demonstrates that courts may also err by exaggerating both the ingenuity of criminal accused and the legitimate fears of policemen. Such judicial timidity leads to ivory tower speculations entirely unrelated to the actions or experience of the officers in the field.[2]

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[2]Though the majority does not explicitly rely on it, the passing reference to the fact that the briefcase was in "plain view" of the officers might be taken as an appeal to that exception to the warrant requirement. However, any such attempt would face two insuperable obstacles. The first was succinctly out-

II. The Automobile Search

Though the panel places its primary reliance on the *Chimel* exception to the warrant requirement, the Government in its brief before this Court concentrated largely on the so called "car exception" to the search warrant requirement first recognized in *Carroll v. United States*, 1925, 267 U.S. 132, and most recently explicated by the Supreme Court in *Coolidge v. New*

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lined in *Collidge v. New Hampshire*, 1971, 403 U.S. 443, 468.

> ". . . [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. . . .Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

In this case, as in *Coolidge*, the "premises" of the criminal suspect consisted of his automobile. Since the FBI agents did not have to enter the car in order to effect Frick's arrest, they had no independent justification for the intrusion on a constitutionally recognized zone of privacy. In the absence of such a justification, the plain view doctrine cannot apply.

Even had the officers been entitled to enter the car, however, the resort to plain view would fail. Frick challenges the introduction of the contents of the briefcase and not the case itself. Those papers were most certainly not in view at all until the seizure and search had been completed. If the plain view doctrine is justified here, then it could as easily be used to justify the warrantless seizure and search of a desk, cabinet, or closet on the premises of the accused at the time of his arrest on the basis of an officer's suspicion or hope that they contained evidence of the crime. This is precisely the kind of broad search *Chimel* was written to curtail.

Hampshire, 1971, 403 U.S. 443. The majority's emphasis on the "mobile" nature of Frick's car and the citation to *Chambers v. Maroney*, 1970, 399 U.S. 42, a decision which relied heavily on *Carroll*, indicate that at least some support was drawn from this argument. At the outset it should be noted that any holding in favor of the applicability of the *Carroll* exception only takes the Government over the first hurdle — it justifies the removal of the briefcase from Frick's car. The subsequent warrantless inspection of the contents of the closed briefcase requires independent analysis.

There are two general requirements for the application of *Carroll* and the consequent warrantless search of a motor vehicle. First, the officers must have probable cause to believe that the car contains contraband or other evidence. Second, certain exigent circumstances must exist such that "it is not practicable to secure a warrant." *Coolidge v. New Hampshire*, 402 U.S. at 460, quoting *Carroll v. United States*, 267 U.S. at 153. The facts of this case fail to demonstrate either of these essential elements.

A. Probable Cause

I concur without reservation in the conclusion of my brothers that no probable cause existed to support a search warrant for Frick's briefcase prior to the day of the arrest. The panel opinion, however, purports to find the missing elements of probable cause merely in the fact that the briefcase was observed in the defendant's car on a weekday morning. The record does

not even disclose that the agents had seen Frick carrying the briefcase on the morning of the arrest. For all that agent McDaniels and his cohorts knew, it had been sitting on the floor of Frick's car for days. Surely the panel does not intend to hold that the arrest of an individual for a crime involving the use of paper automatically creates probable cause to believe that any or every receptacle of the accused is a storehouse for evidence. To say that the arresting officers had probable cause to believe that the briefcase contained evidence of the crime endows those officers with a supernatural clairvoyance. The justification for an arrest does not automatically litmus itself into a justification for a search. There are no facts supporting a belief that the probable cause for arrest and the probable cause for the search were identical twins. To hypothesize that the briefcase contained documents of guilt mocks the logic of Fourth Amendment analysis. Countless innocent items could have been contained within its immobile and non-violent exterior, and constitutional guarantees are not to be nullified by speculation. In this case the officers' suspicions were borne out. But the Supreme Court has made it clear, beyond room for intelligent dispute, that mere suspicion does not constitute probable cause. *See Giordenello v. United States*, 1958, 357 U.S. 480; *Brinegar v. United States*, 1949, 338 U.S. 160; *Black v. Ohio*, 1964, 379 U.S. 89.

B. Exigent Circumstances

Even granting that probable cause existed for the belief that Frick's automobile contained evidence of the crime, the search must still be justified by the

presence of exigent circumstances which made it impractical for the FBI agents to obtain a warrant. There is no other responsible reading of the Supreme Court's decisions, and I interpret the panel's references to various "exigent" factors as a tacit recognition of that fact. *See Carroll v. United States*, supra.; *Brinegar v. United States*, supra.; *Chambers v. Maroney*, supra. The very notion of a category of automobile searches is really no more than the expression of the fact that these extraordinary circumstances requiring immediate action are more likely to occur when the locus of the search is as frequently and easily moved as an automobile.

The Supreme Court's recent decision in *Coolidge v. New Hampshire* involved, like the case before us, the warrantless search of an automobile parked at the defendant's residence. In considering the arguments advanced in support of the police action under *Carroll* and *Chambers*, the Court noted the categories of exigent circumstance necessary to trigger the warrant exception:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a spe-

cial police detail to guard the immobilized automobile."
403 U.S. at 461-62.

The Government and the panel evidently attempt to bring this case within the parameters defined in *Coolidge* and earlier decisions on the basis of the fact that Frick's co-indictee, Petersen, had not yet been taken into custody at the time of the search, and would therefore be likely to disturb the evidence.[3] It should

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[3]The panel opinion mentions three other allegedly "exigent" circumstances justifying the search of Frick's car and briefcase. However, all are so obviously contrary to both the law and common experience, that I have difficulty viewing them as anything more than makeweights, designed to obscure rather than advance constitutional analysis.

(1) *The mobile character of the attache case:* Every Supreme Court decision emphasizing the necessity of a search warrant and the narrow, technical nature of the exceptions has involved evidence no less movable than the briefcase and papers considered here. *See, e.g.*, Coolidge v. New Hampshire, 1971, 403 U.S. 443 (vacuum sweepings); Chimel v. California, 1969, 395 U.S. 752 (coins). At no point has it ever been suggested by the Court that exigent circumstances exist whenever the desired evidence is neither bolted to the floor nor too heavy to move. Indeed, the opinion of the Court in *Coolidge* treated any such contention as the ultimate *reductio ad absurdum* of all faulty Fourth Amendment analysis:

> ". . [A] good number of the containers that the police might discover on a person's property and want to search are equally [as] movable [as an automobile], e.g., trunks, suitcases, boxes, *briefcases*, and bags. How are such objects to be distinguished from an unoccupied automobile — not then being used for any illegal purpose — sitting on the owner's property? It is true that the automobile has wheels and its own locomotive power. But given the virtually universal availability of automobiles in our society there is little difference between driving the container itself away and driving it away in a vehicle brought to the scene for that purpose. Of course, if there is a criminal

first be noted that, if the agents even remotely feared or suspected that Petersen would come to Frick's apartment building after the arrest, their conduct was

---

> suspect close enough to the automobile so that he might get a weapon or destroy evidence within it, the police may make a search of appropriately limited scope. Chimel. . . . But if Carroll v. United States . . . permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of Carroll." 403 U.S. at 461, n. 18. [Emphasis added]

An exception which the Supreme Court was unable to find and unwilling to make in its own cases has evidently developed, contrary to all precedent, in this Circuit.

(2) *The possibility that an unknown friend of the defendant might remove the evidence:* Presumably even the most disagreeable suspect will have a few friends able and perhaps willing to cart off incriminating evidence. But once again, the panel presents no case support for the argument that this possibility creates an exigent circumstance. And even in the case of a confederate on the loose, the law requires at least some indication that the destruction of evidence is likely or imminent. We have nothing here but the Court's ruminations over what the agents might have feared.

(3) *The possibility that the suspect himself, once released on bail, will destroy the evidence:* At this point the opinion enters the realm of the surreal. It is, of course, blatantly incorrect even to suggest that the booking and bail procedure is conducted more speedily than the process for submitting affidavits to a federal magistrate. More importantly, the panel opinion once again asserts as an exceptional, exigent circumstance a condition that has been and will continue to be present in virtually every criminal case. If the panel is correct then exigent circumstances justifying a search on probable cause alone will exist in every case, save that of a friendless defendant, ineligible for bail, or one in possession of indestructible and unmovable evidence. It is beyond me how the majority can reconcile these alleged "exigencies" with its own admission that the exceptions to the warrant requirement are few and well-delineated.

little short of amazing. The record shows that originally a portion of the five agent detachment which participated in the arrest of Frick had been detailed to apprehend Petersen. Unable to locate the latter at his home, this detail tagged along on the Frick arrest. The panel opinion now asks us to believe that trained agents of the FBI, having failed in their initial assignment to apprehend a man, and *having reason to believe that he would arrive at a certain location*, blithely departed that location leaving no one behind to stand guard. To my mind, the action of the agents in departing the scene speaks more convincingly than a volume of post hoc judicial theorizing. At the very least, it points up the failure of the Government to fulfill its burden of clearly demonstrating its contention that there was need for an exception to the warrant requirement, *United States v. Jeffers*, 1951, 342 U.S. 48, 51, because of a reasonable fear on the part of the agents that "confederates [were] waiting to move the evidence." 403 U.S. at 462.

The size of the FBI detachment present at Frick's apartment on the morning of his arrest and the nature of its assignments are strong indications of the inapplicability of *Carroll* and its progeny to this case in another sense as well. Surely in this instance sound law enforcement and the fullest possible protection of Fourth Amendment rights coincided in requiring that the car and its contents remain undisturbed pending application for a warrant, but that a least one of the five agents remain behind on watch. My brother Roney attempts to avoid any such approach by contending that, since the stationing of an agent at the car would

itself constitute an intrusion on Frick's Fourth Amendment rights, the further intrusion of the search and seizure is without additional constitutional significance. I hope that in my shock at such a contention I am not being unfair to the majority; but I can only interpret the opinion as holding that once a small infringement on individual rights is accepted in the name of some important state interest, then any added burden is necessarily proper. The theory is apparently that, if you can take an inch, you are constitutionally entitled to a mile. Even to state the proposition is to reveal its fragility. The holding in *Chambers v. Maroney*, supra., on which the panel evidently relies, is not to the contrary. *Chambers* held that, given the probable cause and exigent circumstances necessary for a highway search under *Carroll*, the police could instead impound the car and conduct the search at the station. In *Chambers* the final intrusion rested on independent constitutional justifications; and in *Coolidge* a majority of the Supreme Court explicitly rejected the notion, evidently advanced by the panel here, that one category of Fourth Amendment exception can justify intrusions different in degree or type. 403 U.S. at 473-484. Indeed, the *Coolidge* opinion specifically noted the presence of police guards on duty at the defendant's house after his arrest as one factor obviating the need for an immediate search. 403 U.S. at 461, & n. 18.

The final deficiency in the panel opinion lies in its failure to explain why, granting for the moment a right to seize the briefcase, the search itself could not have awaited a presentation of the facts to a neutral magis-

trate. Certainly the panel majority cannot hope to rest behind the discredited notion that lesser intrusions can justify greater ones. *See United States v. Garay*, 5 Cir. 1973, 477 F.2d 1306; *United States v. Brett*, 5 Cir. 1969, 412 F.2d 401, 406. Viewed from any angle there were no circumstances requiring the agents to search without a warrant at the time of Frick's arrest. And in the absence of such compulsion, the representatives of the United States, whether officers in the field or judges on the appellate bench, are never justified in departing from the Constitution's command that searches be authorized by warrants.

In epilogue I can only express my hope that the current judicial mood will not result in the relegation of the Fourth Amendment to oblivion. Privacy meant so much to the founding fathers that, in order to guarantee its primacy, they were willing to countenance the possibility that criminals might at times conceal the fruits or other indicia of their crimes. The wiser course for both judges and private citizens is to heed their teachings on the fundamental requirements of a free society. This is my judicial philosophy — strict constructionism, if you please.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert Lee FRICK and Quimet John Petersen, Defendants-Appellants.

No. 72 2275.

United States Court of Appeals, Fifth Circuit.

March 15, 1974.

Appeals from the United States District Court for the Eastern District of Louisiana; Alvin B. Rubin, Judge.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion December 5, 1973, 5 Cir., 1973, F.2d).

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

PER CURIAM:

On petitions for rehearing, we have considered whether our opinion sets any precedent in the law of search and seizure as it applies to so-called exigent circumstances unrelated to the execution of a warrant for arrest. Believing as we do, that all facts must be considered in determining the reasonableness of a search without a warrant, our holding here is not compartmentalized so as to make any facts unimportant and we voice no opinion whatsoever as to whether we would hold this search reasonable absent the arrest warrant or upon any of the other facts differing from those at bar. The petitions for rehearing are denied.

Judge Goldberg would grant the petitions for rehearing for the reasons set forth in his dissent to the panel opinion.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitions for rehearing en banc are denied.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Mary Beth Johnson
Deputy
New Orleans, Louisiana APR 5 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1704

QUIMET J. PETERSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 81-103) and its *per curiam* opinion denying rehearing (Pet. App. 104-105) are reported at 490 F. 2d 666.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1973. A petition for rehearing and rehearing *en banc* was denied on March 15, 1974. On April 11, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 14, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had standing to challenge the seizure and search of his co-defendant's brief case found in the co-defendant's automobile at the time of the co-defendant's arrest.

2. Whether the government withheld exculpatory evidence in violation of the rule in *Brady* v. *Maryland*, 373 U.S. 83.

3. Whether the prosecuting attorney's questions or argument were improper and prejudicial.

4. Whether various instructions and rulings by the court were erroneous.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner and his co-defendant, Robert Lee Frick, were found guilty on all five counts of an indictment charging use of the United States mails and interstate telephone and wire facilities to defraud, and with conspiracy to defraud, in violation of 18 U.S.C. 1341, 1343, 371, and 2. Petitioner was sentenced to concurrent sentences of three years' imprisonment subject to eligibility for parole after six months, pursuant to the provisions of 18 U.S.C. 4208(a)(1), on each count. The court of appeals affirmed, one judge concurring in part and dissenting in part (Pet. App. 81-103).

The facts show that petitioner and Frick were engaged in a scheme to defraud business people in need of capital by falsely promising to obtain loan financing for them in exchange for a fee. The clients would never receive the loans for which they had applied, nor would the fees be returned to them.

The testimony of Frank Crawly, III, the complaining witness, demonstrates how the scheme operated. Crawly owned the Bison Lumber and Supply Company in Shawnee, Oklahoma. In April, 1971, he attempted to obtain a loan to consolidate several outstanding loans and to buy out his partner (Tr. 31-32). A friend referred Crawly to Frick, who told him that he represented the Mortgage Corporation of America. Crawly told Frick that he wanted a loan of $400,000, which Frick said he would consider. Crawly then gave Frick a copy of his financial statement and pictures of his lumber yard (Tr. 37-39). Frick called Crawly a few weeks later and told him that the loan committee had approved a loan for $375,000 and that if Crawly was serious Frick would bring him a loan application shortly (Tr. 45-47). Crawly executed the loan papers and gave Frick a check for $3,750, which, supposedly, was a 1% earnest money fee (Tr. 56-57).

Frick subsequently advised Crawly that his application had been approved, and Crawly proceeded to comply with all of the directions given him by Frick (Tr. 63-66). Petitioner, Crawly and Frick met in New Orleans. Petitioner was introduced to Crawly as an associate with Mortgage Corporation of America. Frick gave Crawly a letter of commitment supposedly from the Tangible Risk Insurance Co., Ltd. (Tr. 71-73), in exchange for which Crawly gave Frick a check for $4,600 and cash in the amount of $937.50 (Tr. 75). This money, Crawly was led to believe, was in part for the loan application fee and in part for Frick (Tr. 76). Crawly testified that while in New Orleans he discussed arrangements for the loan with petitioner (Tr. 80-81).

Later, Crawly wired $1,000 to petitioner to perform an appraisal of his property (Tr. 97-101). Both petitioner and Frick later told Crawly that the loan was ready to

be closed, but on the appointed day only Crawly appeared. Crawly was subsequently told that Tangible Risk's loan officer was tied up on the agreed day but that the closing could take place a day later. After this second meeting was also cancelled, the closing was set for the following week. Crawly then called petitioner, who told him not to worry, that the closing would occur shortly. The loan was never closed, Crawly was never given a reason for failure to close the loan and was never told that he failed to comply with any of the loan requirements. The $10,000 already paid to petitioner and Frick was never returned, although Crawly made demands on both (Tr. 111-114).

The government also offered the testimony of Mrs. Janet M. Troxler, co-owner of the Jet Typing Service, Inc., who testified that petitioner had engaged her company to type a letter to Crawly on a Tangible Risk Insurance Co., Ltd. letterhead, which petitioner had provided her (Tr. 262-267).

Additionally, several witnesses testified that they knew petitioner and Frick under different names and that they had been victims of essentially the same scheme. Each witness testified that he had been promised financing, that he completed the necessary applications and paid the required fees, that he never received his loan and that the money paid to petitioner and Frick was never repaid (Tr. 279-289, 291-301, 306-307, 314-325, 344-349).

The briefcase, the seizure of which petitioner contests, contained files and documents belonging to Frick. Among the items seized from the briefcase were a Bison Lumber Company balance sheet, and a draft loan document which referred to the borrower as the "sucker" (Tr. 373-377; Govt. Ex. G-25).

Frick was arrested, pursuant to an arrest warrant, by FBI agent McDaniels accompanied by four other agents, while he was standing outside his automobile with the car door open. McDaniels identified himself and stated to Frick that he was under arrest (Tr. 364-368). While placing Frick under arrest, McDaniels saw the briefcase lying on the floor in the back of the vehicle immediately behind the driver's seat, and seized it (Tr.364-367).[1] Frick's motion to suppress the evidence was denied (Tr. 369; see also proceedings on Motion to Suppress Illegally Seized Evidence, February 16, 1972, Tr. 19-26).

ARGUMENT

Petitioner has no standing to challenge the seizure of Frick's briefcase from Frick's car at the time of Frick's arrest. In *Brown* v. *United States*, 411 U.S. 223, 229, the Court held that to establish his standing a party must show that he was on the premises at the time of the contested search and seizure; that he had a proprietary or possessory interest in the premises searched; or that he was "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." See also *Alderman* v. *United States*, 394 U.S. 165, 173, 176-180; *Simmons* v. *United States*, 390 U.S. 377; *Jones* v. *United States*, 362 U.S. 257, 261. Petitioner clearly does not meet these criteria. Petitioner was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile or briefcase searched, and was not charged with an offense requiring possession.

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[1]Petitioner implies (Pet. 11) that McDaniels had examined Frick's car and observed the briefcase prior to Frick appearing on the scene. This is unsupported by the transcript either as cited by petitioner (Tr. Motion to Suppress at 19) or elsewhere.

The record, therefore, establishes that petitioner was without standing to challenge the sufficiency of the search and seizure, as the court of appeals found (Pet. App. 82-83).

Moreover, petitioner did not move to suppress the evidence seized prior to trial, or at trial; nor did he raise this issue at the court of appeals. Petitioner alleges for the first time in his petition to this Court that the briefcase seized from Frick's car actually belonged to him and that he simply had lent it to Frick to use (Pet. 6). Since the issue of petitioner's ownership of the briefcase was not raised previously, it would be inappropriate for this Court to make that factual determination in the first instance. *Lawn* v. *United States*, 355 U.S. 339, 362,n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2.[2]

2. Petitioner contends (Pet. 22-45) that the government failed to disclose to him information which was favorable to his case.[3] The three items of information

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[2]Petitioner's co-defendant Frick moved, unsuccessfully, to suppress the evidence found in the briefcase, but petitioner did not join in that motion. Even assuming, *arguendo*, that petitioner was the lawful owner of the seized briefcase, that he has not waived his right to make that claim, and that he had standing to challenge the search, we rely on the court of appeals' finding that the search and seizure in this case were lawful (Pet. App. 83-88). See *Chimel* v. *California*, 395 U.S. 752, 763; *Chambers* v. *Maroney*, 399 U.S. 42, 52; *United States* v. *Robinson*, 414 U.S. 218; *Cardwell* v. *Lewis*, No. 72-1603, decided June 17, 1974. Moreover, even if this search were found to be unlawful, this would constitute harmless error in light of the overwhelming evidence of guilt present in this case and the cumulative nature of the evidence in the briefcase. *Chapman* v. *California*, 386 U.S. 18, 22-24; *Harrington* v. *California*, 395 U.S. 250.

[3]Contrary to petitioner's contention (Pet. 22), petitioner did not move for the production of exculpatory material. However, co-defendant Frick filed such a motion, which was granted.

which petitioner asserts should have been surrendered to him are: an F.B.I. report indicating that an Oklahoma City Postal Inspector was familiar with Tangible Risk Insurance, Co., Ltd.; correspondence from the Postal Inspector in Shreveport relating to the existence of Tangible Risk; and correspondence from Joseph P. Humphreys, who was the Executive Director of the Non-Admitted Inurers Information Office, relating to certain corporate aspects of Tangible Risk. After the court of appeals affirmed the decision of the district court in this case, petitioner and Frick moved in the district court for a new trial, alleging, among other things, that the prosecutor had failed to reveal the material at issue here. After an evidentiary hearing, the trial court in a written opinion denied the motion. That denial is now pending on appeal in the Fifth Circuit. It is thus unnecessary for this Court to consider those issues. In any event, we rely on the thorough opinion of the district court denying the motion, which shows that the evidence in question was neither material nor exculpatory.[4] As the court of appeals correctly pointed out, "*Brady* * * * does not require all evidence to be produced to the defense, just that which is material. *United States* v. *Jordan*, 399 F. 2d 610, 615 (2nd Cir., 1968)." (Pet. App. 89).

3. Petitioner contends that certain statements (see Pet. 46-47, 50-56) made by the prosecutor during his opening statement, trial, and in closing argument were improper and prejudicial thereby requiring reversal. This contention is without merit. Typical statements complained of in the opening argument are:

---

[4]We are lodging with the Clerk a copy of the opinion and transcript of testimony on the motion for a new trial. See Opinion, pp. 5-9.

We feel that we will prove that the defendants did devise a scheme to defraud * * * [Tr. Opening argument, p. 5].

We intend to prove that they promoted their scheme all over the United States * * * [*ibid.*].

* * * * *

In fact, I think that the evidence will verify that Mr. Crawly considered himself threatened by the defendants not to take any action against them to get his money back [Tr. Opening argument, pp. 8-9].

* * * * *

In closing:

We feel that after looking at those exhibits, you will in fact return a verdict of guilty [Tr. Closing argument, p. 88].

* * * * *

His Honor instructed we need only prove one act. I submit to you we proved all acts [*Id.*, p. 92].

* * * * *

No objections were made to any of these statements at the time they were made. As to the opening statement, it is necessarily made before evidence is presented and the prosecutor can only say what he intends to prove. In closing argument, the prosecutor tries to assist the jury in analyzing, evaluating and applying the evidence, and he has the right to express his judgment or opinion as to the conclusions to be drawn from facts in evidence. *Tuckerman* v. *United States*, 291 Fed. 958 (C. A. 6), certiorari denied, 263 U.S. 716; *United States* v. *Holt*, 108 F. 2d 365 (C. A. 7), certiorari denied, 309 U.S. 672,

rehearing denied, 309 U.S. 698; *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6).[5]

4. Petitioner also contends that the court committed numerous errors in its rulings and instructions (Pet. 62-63). These contentions were all rejected by the court of appeals (Pet. App. 88) on whose opinion we rely (Pet. App. 88-90).[6] Only one deserves fuller comment.

Petitioner contends that the district court's instruction that "it's not necessary to determine whether Mr. Petersen was a member of a conspiracy" (Tr. 446), was plain error. Petitioner takes this instruction out of context. The entire instruction clarifies the court's charge. The court stated:

> In other words, it's not necessary to prove that every one of those acts alleged in Count I was agreed on or that every one of them was done, but what the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish some object or purpose of the charged conspiracy and that two or more persons, including one or both of the accused, were knowingly members of the conspiracy, as charged.

---

[5]Petitioner also raised improper closing argument as one of his grounds for a new trial, and this issue, like the *Brady* issue, is pending appeal in the Fifth Circuit. See Opinion on motion for new trial, pp. 9-10.

[6]Petitioner also challenges the trial judge's refusal to grant a continuance after changing his decision to sever the trials of petitioner and his co-defendant. However, he has not shown any prejudice to him caused by the denial of his motion for a continuance.

> You may consider, in determining this, the actions of the Defendants, each of them separately. In determining whether or not either Defendant was himself a member of the conspiracy, you are not to consider what the other Defendant said or did. In other words, to determine whether or not Mr. Frick was a member of the conspiracy, you may consider only what Mr. Frick said or did, and it's not necessary to determine whether Mr. Petersen was a member of a conspiracy, you must consider only what Mr. Petersen said or did.
>
> If you find it proved beyond a reasonable doubt, however, applying this test, that they were both members of the conspiracy, then you may consider what either of them did separately thereafter as evidence against the other one. [Tr. 445-447.]

This charge read as a whole was not erroneous; it emphasized the necessity of making a finding as to each conspirator. It was clear under the charge, however, that the jury could not find a conspiracy without finding that the conspirators, beyond a reasonable doubt, conspired with each other to break the law.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.